SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 884.

THE UNITED STATES OF AMERICA

vs.

SOLOMON LOUIS GINSBERG.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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1 United States Circuit Court of Appeals, Eighth Circuit.

UNITED STATES, APPELLANT,
vs.
SOLOMON LOUIS GINSBERG, APPELLEE. } No. 4363.

The United States Circuit Court of Appeals for the Eighth Circuit hereby certifies that a record on an appeal now pending before it discloses the following:

The United States of America brought a suit in the District Court of the United States for the Western District of Missouri to cancel a certificate of citizenship issued December 18, 1912, to Solomon Louis Ginsberg, a native of Russia. The suit was brought under the provision of sec. 15 of the act of June 29, 1906, c. 3592, 34 Stat. 596, authorizing—

"proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured."

On final hearing the trial court dismissed the bill. The Government appealed.

The grounds for cancellation averred in the bill were: (a)
2 The certificate of citizenship was illegally procured in that there was a violation of the provision of sec. 9 of the act of June 29, 1906, "that every final hearing upon such petition (for naturalization) shall be had in open court before a judge or judges thereof," the hearing in question having been before a judge in chambers and not in open court. (b) The certificate of citizenship was illegally procured because though the averments of Ginsberg's petition and the verifying affidavits of his witnesses were in due form and sufficient on their face, yet the undisputed facts disclosed at the hearing of the petition showed he was not qualified to be admitted to citizenship; and the petition was also a fraud upon the law.

At the trial of the suit below there was no conflict in the evidence as to time, place, and circumstances of the hearing of the petition for naturalization nor as to Ginsberg's qualifications for citizenship and the disclosures thereof to the judge who awarded the certificate. Sworn statements of these matters by Ginsberg and the two men who acted as his witnesses were made part of the bill of complaint, and, with the court records of which judicial notice was taken, constituted the sole evidence upon which the trial court refused to cancel the certificate and dismissed the bill. This evidence showed the following:

The petition for naturalization was heard by an United States district judge assigned for service at Kansas City in the Western District of Missouri, not the regular judge of that district. The

petition was first brought up at a night session of the court
3 December 16, 1912, and the hearing thereof was postponed by the court with direction to Ginsberg and his witnesses to appear at the judge's chambers some time after 8 o'clock a. m. December 18, 1912. The judge's chambers were separate from but contiguous to the court room. According to direction they appeared at the chambers about half past 8 o'clock in the morning, the hearing was then had, and the certificate of citizenship was awarded. As shown by the court records for the previous day court had adjourned until a later hour on the 18th than that at which the petition was heard. The petition for naturalization was filed June 7, 1912. The proofs at the hearing of it showed that Ginsberg had not resided continuously within the United States five years, nor within the State of Missouri one year, immediately preceding the date of his application, as required by sec. 4, pp. 2 and 4 of the act of January 29, 1906. Ginsberg was a native subject of Russia. He finished his school studies in England in 1890. He then went to Brazil and engaged in missionary work. In 1893 he identified himself with a foreign mission board in that country with which he served continuously thereafter. At the end of each seven years of service he was allowed a vacation of abount fourteen months, and, having married in Brazil in 1893 a native of the State of Missouri, he was accustomed to spend his vacations with his wife's relatives in the latter place, following
4 which, to use his expression, "he would return to his home in Brazil." When he declared his intention to become a citizen of the United States in 1904 it was his intention to sever his connection with the mission board and remain in this country, but the condition of his work in Brazil made it necessary for him to resume his residence there. In the five years preceding June 7, 1912, when his petition for naturalization was filed, he had been "actually and physically resident within the United States" but fifty-eight days, that is, from the 10th of the preceding April. When he filed his petition for naturalization and testified in support thereof he had no intention of claiming continuous residence in the United States, but whenever asked he stated the facts about his actual residence in Brazil as above recited. He said the clerk of the court prepared his petition, the averments of which if true were sufficient under the law.

It is further certified that the following questions of law arise from the record and are presented, the decision of which is indispensable to a determination of the case. To the end that this court may properly discharge its duty it desires the instruction of the Supreme Court upon them:

1—Is the final hearing of a petition for naturalization had in open court as required by sec. 9 of the act of June 29, 1906, c. 3592,
5 if after the petition is first presented in open court the hearing thereof is passed to and finally held in the chambers of the judge adjoining the court room, on a subsequent day and at an hour earlier than that to which the court has been regularly adjourned?

2—If under the above circumstances the final hearing of the petition was not in open court as required, may the certificate of citizenship issued on such a hearing and the order pursuant thereto be set aside and canceled in an independent suit brought under section 15 of the act of June 29, 1906, c. 3592, on the ground that it was illegally procured or is a fraud upon the law?

3—Is it a fraud for which a certificate of citizenship may be set aside and canceled in an independent suit brought under section 15 of the act of June 29, 1906, c. 3592, if the essential averments of residence in the petition for naturalization are sufficient on their face but are false in fact, the petitioner having acted in good faith and in reliance upon the officer who prepared the petition for him and having disclosed the truth at the hearing thereof?

4—May a certificate of citizenship be set aside and canceled in an independent suit brough under section 15 of the act of June 29, 1906, c. 3592, on the ground that it was illegally procured if the uncontradicted evidence at the hearing of the petition showed indisputably that the petitioner was not qualified by residence for citizenship and that the court or judge who heard the petition and ordered the certificate misapplied the law and the facts?

WILLIAM C. HOOK,
United States Circuit Judge.
JAS. D. ELLIOTT,
United States Dist. Judge.
FRANK A. YOUMANS,
U. S. Dist. Judge.

Being the judges who sat in the Circuit Court of Appeals, on the hearing of the case.

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing certificate in the case of United States of America, appellant, *vs.* Solomon Louis Ginsberg, No. 4363, was duly filed and entered of record in my office by order of said court, and, as directed by said court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

IN testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Louis, Missouri, this fourth day of March, A. D. 1916:

[SEAL.] JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Documentary revenue stamp not required.

(Indorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. December Term, 1915. No. 4363. United States of America, appellant,

vs. Solomon Louis Ginsberg. Certificate of questions to the Supreme Court U. S., under sec. 134 of the Judicial Code. Office of the clerk. Received Mar. 6, 1916, Supreme Court U. S. Filed Mar. 4, 1916. John D. Jordan, clerk.

(Indorsement on cover:) File No. 25,167. U. S. Circuit Court Appeals, 8th Circuit. Term No. 884. The United States of America *vs.* Solomon Louis Ginsberg. (Certificate.) Filed March 9th, 1916. File No. 25,167.

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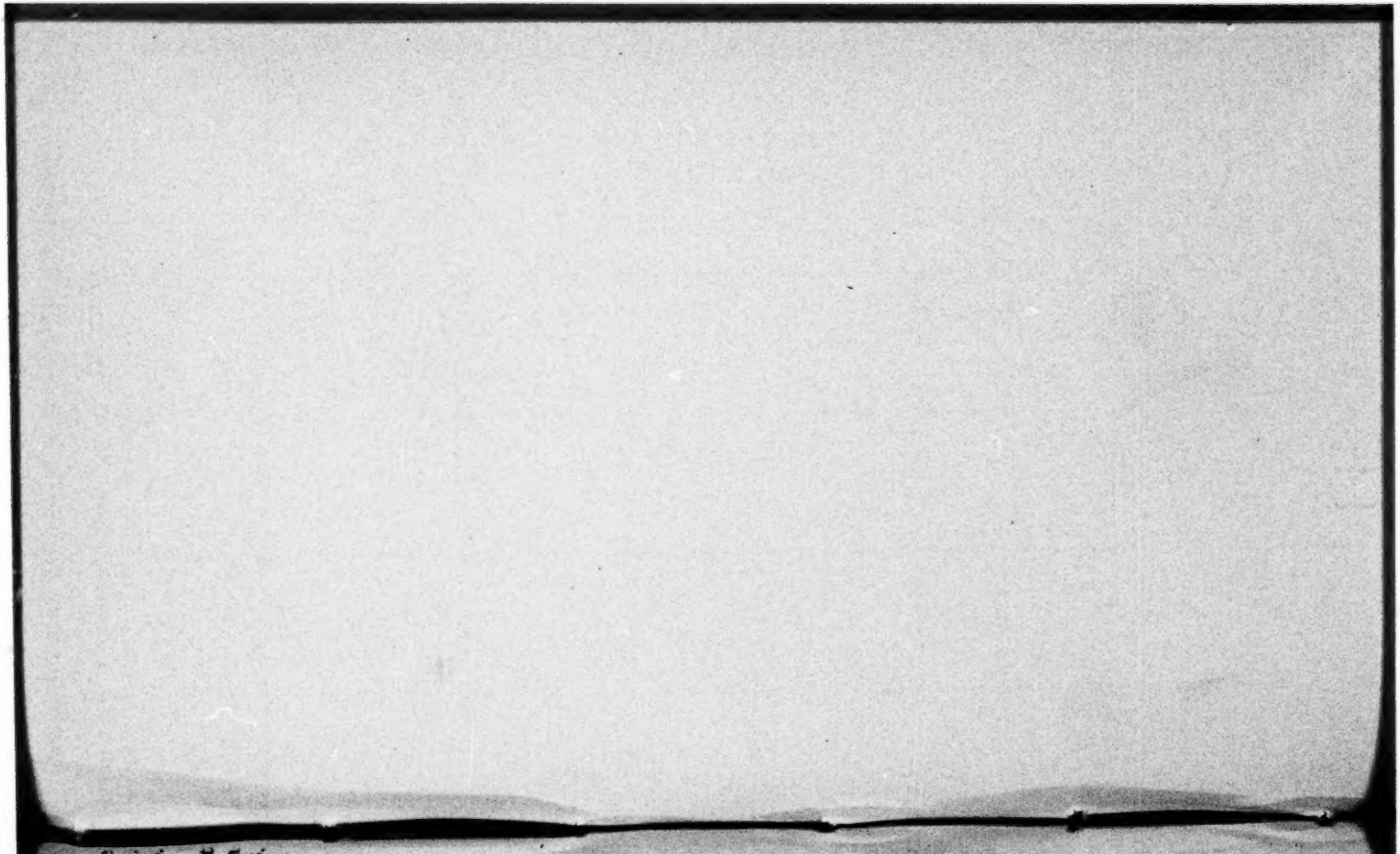

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES OF AMERICA
v.
SOLOMON LOUIS GINSBERG. } No. 401.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and moves the court to advance the above-entitled cause for hearing on a day convenient to the court.

Under section 15 of the act of June 29, 1906, 34 Stat. 596, the United States brought suit in the District Court of the United States for the Western District of Missouri to cancel a certificate of citizenship which had been issued to Solomon Louis Ginsberg, a native of Russia, on the ground *inter alia* that the certificate had been procured illegally in that the final hearing on the petition for naturalization had been held before a judge in chambers and not in open court as required by section 9 of said act.

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The district court dismissed the petition and an appeal was taken to the Circuit Court of Appeals for the Eighth Circuit which has certified to this court the following questions.

I.

Is the final hearing of a petition for naturalization had in open court as required by section 9 of the act of June 29, 1906, c. 3592, if after the petition is first presented in open court the hearing thereof is passed to and finally held in the chambers of the judge adjoining the court room, on a subsequent day and at an hour earlier than that to which the court has been regularly adjourned?

II.

If under the above circumstances the final hearing of the petition was not in open court as required, may the certificate of citizenship issued on such a hearing and the order pursuant thereto be set aside and canceled in an independent suit brought under section 15 of the act of June 29, 1906, c. 3592, on the ground that it was illegally procured or is a fraud upon the law?

III.

Is it a fraud for which a certificate of citizenship may be set aside and canceled in an independent suit brought under section 15 of the act of June 29, 1906, c. 3592, if the essential averments of resi-

dence in the petition for naturalization are sufficient on their face but are false in fact, the petitioner having acted in good faith and in reliance upon the officer who prepared the petition for him and having disclosed the truth at the hearing thereof?

IV.

May a certificate of citizenship be set aside and canceled in an independent suit brought under section 15 of the act of June 29, 1906, c. 3592, on the ground that it was illegally procured if the uncontradicted evidence at the hearing of the petition showed indisputably that the petitioner was not qualified by residence for citizenship and that the court or judge who heard the petition and ordered the certificate misapplied the law and the facts?

The questions are of importance to the Department of Labor in the administration of the naturalization laws and as the answers of this court will govern that department in future administration of those laws, an early determination thereof by this court is desirable.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

NOVEMBER, 1916.

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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES OF AMERICA
v.
SOLOMON LOUIS GINSBERG.
No. 401.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

In the certificate submitted to this court by the Circuit Court of Appeals the facts upon which the questions arise are given as follows:

> The United States of America brought a suit in the District Court of the United States for the Western District of Missouri to cancel a certificate of citizenship issued December 18, 1912, to Solomon Louis Ginsberg, a native of Russia. The suit was brought under the provision of sec. 15 of the act of June 29, 1906, c. 3592, 34 Stat. 596, authorizing—
> "proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may

reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured."

On final hearing the trial court dismissed the bill. The Government appealed.

The grounds for cancellation averred in the bill were: (a) The certificate of citizenship was illegally procured in that there was a violation of the provision of sec. 9 of the act of June 29, 1906, "that every final hearing upon such petition (for naturalization) shall be had in open court before a judge or judges thereof," the hearing in question having been before a judge in chambers and not in open court. (b) The certificate of citizenship was illegally procured because though the averments of Ginsberg's petition and the verifying affidavits of his witnesses were in due form and sufficient on their face, yet the undisputed facts disclosed at the hearing of the petition showed he was not qualified to be admitted to citizenship; and the petition was also a fraud upon the law.

At the trial of the suit below there was no conflict in the evidence as to time, place, and circumstances of the hearing of the petition for naturalization nor as to Ginsberg's qualifications for citizenship and the disclosures thereof to the judge who awarded the certificate. Sworn statements of these matters by Ginsberg and the two men who acted as his witnesses were made part of the bill of complaint, and, with the court records of which judicial notice was taken, constituted the sole

evidence upon which the trial court refused to cancel the certificate and dismissed the bill. This evidence showed the following:

The petition for naturalization was heard by an United States district judge assigned for service at Kansas City in the Western District of Missouri, not the regular judge of that district. The petition was first brought up at a night session of the court December 16, 1912, and the hearing thereof was postponed by the court with direction to Ginsberg and his witnesses to appear at the judge's chambers some time after 8 o'clock a. m. December 18, 1912. The judge's chambers were separate from but contiguous to the court room. According to direction they appeared at the chambers about half past 8 o'clock in the morning, the hearing was then had, and the certificate of citizenship was awarded. As shown by the court records for the previous day court had adjourned until a later hour on the 18th than that at which the petition was heard. The petition for naturalization was filed June 7, 1912. The proofs at the hearing of it showed that Ginsberg had not resided continuously within the United States five years, nor within the State of Missouri one year, immediately preceding the date of his application, as required by sec. 4, pp. 2 and 4 of the act of January 29, 1906. Ginsberg was a native subject of Russia. He finished his school studies in England in 1890. He then went to Brazil and engaged in missionary work. In 1893 he identified himself with a foreign mission board in that country

with which he served continuously thereafter. At the end of each seven years of service he was allowed a vacation of about fourteen months, and, having married in Brazil in 1893 a native of the State of Missouri, he was accustomed to spend his vacations with his wife's relatives in the latter place, following which, to use his expression, "he would return to his home in Brazil." When he declared his intention to become a citizen of the United States in 1904 it was his intention to sever his connection with the mission board and remain in this country, but the condition of his work in Brazil made it necessary for him to resume his residence there. In the five years preceding June 7, 1912, when his petition for naturalization was filed, he had been "actually and physically resident within the United States" but fifty-eight days, that is, from the 10th of the preceding April. When he filed his petition for naturalization and testified in support thereof he had no intention of claiming continuous residence in the United States, but whenever asked he stated the facts about his actual residence in Brazil as above recited. He said the clerk of the court prepared his petition, the averments of which if true were sufficient under the law.

Upon the foregoing facts the Circuit Court of Appeals has certified four questions, namely:

1. Is the final hearing of a petition for naturalization had in open court as required by sec. 9 of the act of June 29, 1906, c. 3592, if after the petition is first presented in open

court the hearing thereof is passed to and finally held in the chambers of the judge adjoining the court room, on a subsequent day and at an hour earlier than that to which the court has been regularly adjourned?

2. If under the above circumstances the final hearing of the petition was not in open court as required, may the certificate of citizenship issued on such a hearing and the order pursuant thereto be set aside and cancelled in an independent suit brought under section 15 of the act of June 29, 1906, c. 3592, on the ground that it was illegally procured or is a fraud upon the law?

3. Is it a fraud for which a certificate of citizenship may be set aside and canceled in an independent suit brought under section 15 of the act of June 29, 1906, c. 3592, if the essential averments of residence in the petition for naturalization are sufficient on their face but are false in fact, the petitioner having acted in good faith and in reliance upon the officer who prepared the petition for him and having disclosed the truth at the hearing thereof?

4. May a certificate of citizenship be set aside and canceled in an independent suit brought under section 15 of the act of June 29, 1906, c. 3592, on the ground that it was illegally procured if the uncontradicted evidence at the hearing of the petition showed indisputably that the petitioner was not qualified by residence for citizenship and that the court or judge who heard the petition and ordered the certificate misapplied the law and the facts?

ARGUMENT.

THE FIRST QUESTION.

THE WORDS "IN OPEN COURT" AS USED IN SECTION 9 OF THE NATURALIZATION ACT MEAN A COURT FORMALLY OPENED AND ORGANIZED FOR THE TRANSACTION OF JUDICIAL BUSINESS, AND THE WORDS "EVERY FINAL HEARING SHALL BE HAD," ETC., MEAN THAT THE HEARING SHALL BE WHOLLY, NOT PARTLY, HAD IN OPEN COURT.

Subdivision 3 of section 4 of the act of June 29, 1906 (34 Stat. 596), provides that an alien—

> shall, before he is admitted to citizenship, declare on oath in *open court* that he will support the Constitution of the United States, * * * etc. [*Italics ours.*]

Although by the terms of section 6 of that act a petition for naturalization may be filed either during term time or vacation of the court that section expressly prescribes that

> final action thereon shall be had only on stated days, to be fixed by rule of the court, and in no case shall final action be had upon a petition until at least ninety days have elapsed after filing and posting the notice of such petition.

The act further provides:

> SEC. 9. That every final hearing upon such petition shall be had *in open court* before a judge or judges thereof, and every final order which may be made upon such petition shall be under the hand of *the court* and entered in full upon a record kept for that purpose, and upon such final hearing of such petition the applicant and witnesses shall be examined under oath before the court and in the *presence of the court.*

An "open court" contemplates a regular opening and closing, the presence of the judge, of the clerk, and of the clerk's docket, upon which latter should be entered, under the eye of the court, the successive steps taken in open court in each case. *Hays* v. *Philadelphia W. & B. R. Co.*, 99 Md. 413. Bouvier defines an "open court" as—

> a court formally opened and engaged in the transaction of all judicial functions; the term is used in the first sense as distinguishing a court from a judge sitting in chambers or informally for the transaction of such matters as may be thus transacted.

Section 9 of the Judicial Code (section 574, R. S.) declares that the district courts sitting in *equity* or *admiralty* shall be deemed "always open" for the transaction of *certain* business. The case of *Butler* v. *United States*, 87 Fed. 655, cited with approval by this court in *United States* v. *Finnell*, 185 U. S. 236, treats exhaustively of the fees of the clerk under the act of March 3, 1887 (24 Stat. 541), forbidding the payment of *per diem* to that officer except for days when "the court is opened by the judge for business or business is actually transacted in court." The claim of the clerk was sustained because he was in attendance upon the court and the judge was present on those days and orders, decrees, and rules were made and entered in equity and admiralty causes. In its opinion the court said:

> Chancery, admiralty, and bankruptcy courts are in session during these regular and special terms, and they also sit, and therefore are in

> session, whenever and wherever the judicial business which is described in sections 574, 638, and 4973 of the Revised Statutes, and in section 16, act Feb. 4, 1887, is actually transacted by one or more of the judges of these courts. In all of these cases, when a court is in session during a regular or special term, or when it is in session by reason of the transaction of business under the sections aforesaid, it is equally necessary that its clerk should be in attendance upon it, with its records, at the place where the records are kept by him, to receive the orders, decrees, and rules of the court and its instructions concerning them. If no business were transacted at a regular or special term, his attendance would be necessary; and it is always necessary when business is transacted in or by the court. (658.)

In *Jaynes* v. *United States*, 47 Ct. Cl. 523, the clerk claimed *per diem* for entering and docketing petitions in naturalization cases upon the assumption that the court was open as in admiralty, equity, and bankruptcy proceedings. In deciding against such interpretation of the naturalization act the court said:

> There is no provision in the act requiring the court to be kept open for the filing and docketing of naturalization papers, as in equity, admiralty, and bankruptcy proceedings. On the contrary, the act provides that such petitions may be filed and docketed during the *vacation* of the court as well as in term time, leaving final action thereon to be had on stated days, to be fixed by rule of court. * * *
>
> * * * * *

> Fees for attendance on court are not based on service rendered in any particular case, but because court *is open* and it is the duty of the clerk to attend. The fees provided in the act are evidently intended to cover the cost accruing on the filing of such petition, and if upon such final hearing the clerk is entitled to fees for attendance it is not because of any service rendered in such case, but because *the court is open* and *the clerk attends.* * * * In the Marvin case (45 C. Cls., 528) the findings, without any qualifying words, show that the service was "for attendance upon the court by the clerk, when the judge was certified to be personally present." True, they do not otherwise show that the court was open, but the finding of the ultimate fact that the service was "for attendance upon the court" and that the judge was personally present would clearly imply that the court was open in fact. Therefore, the language of the court, that the naturalization of aliens is "placed on an equal footing with bankruptcy proceedings and regular chancery and admiralty business so far as the receiving and entering of petitions by the court or courts are concerned," was not necessary to the decision of the case.

In *McMullen* v. *United States*, 146 U. S. 360, when considering Section 829 R. S. fixing the compensation of a marshal "for attending the Circuit and District Courts, when both are in session, or either of them when only one is in session, and for bringing

in and committing prisoners and witnesses during the term," this court said:

> When the court is open, by its order, for the transaction of business, it is in session within the meaning of this section. If the court by its own order, is closed for all purposes of business for an entire day, or for any given number of days, it is not in session on that day, or during those days, although the current term has not expired. It is made by statute the duty of the Marshal of each district "to attend the District and Circuit Courts when sitting therein." Rev. Stat. sec. 787. Within its meaning the court cannot be said to be sitting on any day when it is closed, by its own order, during the whole of that day for purposes of business.

In *United States* v. *Pitman*, 147 U. S. 669, this court said—

> After the term of a court has been regularly opened upon the day provided by law, the question how long it shall remain open, to what day it shall be adjourned, and whether and how often it shall be opened for incidental business after the regular business of the term has been concluded, is a matter which rests in the discretion of the presiding judge.

The final hearing in this case was had in the judge's chambers prior to the hour to which the court on the previous day had been regularly adjourned. There is no difference between an adjournment from one day to the next and an adjournment for a longer time. 7 Ruling Case Law, section 18.

That the final hearing which consists chiefly of the examination of witnesses did not in this case take place in open court is obvious from the facts certified to this court. Section 9 supra does not provide that the "final hearing shall be *begun* in open court" or that it "shall be had, wholly or *in part* in open court" nor may its language be fairly so read.

THE SECOND QUESTION.

THE PROVISION THAT FINAL HEARINGS SHALL BE HAD IN OPEN COURT IS MANDATORY AND JURISDICTIONAL AND ITS VIOLATION WARRANTS CANCELLATION SUIT UNDER SECTION 15 OF THE ACT.

House report No. 1789 of the Committee on Immigration and Naturalization (59th Cong., 1st sess.) states that frauds committed under earlier laws had—

> assumed such stupendous proportions that the President deemed it necessary by an Executive Order of March 1, 1905, to appoint a special commission to investigate and report upon the subject.

The present Naturalization Act is in a large measure the result of the comprehensive report of that commission. The committee said the former statutes did—

> not seek to do more than to enunciate the general principles which should control in the naturalization of aliens * * * In order to correct the abuses that have been disclosed it is imperative, in the judgment of your Committee, that a law should be enacted prescribing a fixed and uniform system and a code of procedure in naturalization matters.

Section 15 of that act makes it the duty of the United States attorney—

> upon affidavit showing good cause therefor, to institute proceedings * * * , for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured.

In the comparatively few instances in which the courts have felt called upon to express an opinion with respect to the provision in section 9, that every final hearing upon a petition for naturalization shall be had in open court, it has been declared to be mandatory. In the cancellation suit of *United States* v. *Nisbet*, 168 Fed. 1005, the evidence at the hearing of the applicant's petition consisted of the testimony of the two witnesses who signed the petition supplemented by depositions of two other witnesses. Concerning the use of the depositions, Judge Hanford said:

> The ninth section of the Act of Congress above referred to, under which the petition for naturalization was filed, is specific and mandatory in requiring that the hearing should be in open court, and that the applicant and witnesses should be examined under oath "before the court and in the presence of the court;" and, except as provided in the tenth section, the court was not authorized to receive or consider evidence taken by depositions out of the presence of the court. Without the depositions, there was a lack of evidence to establish the facts necessary to

> entitle the defendant to become a naturalized citizen of the United States. The manifest intention of Congress, in the enactment of the naturalization law of 1906, was to prescribe rigid rules to be observed by the courts in naturalization proceedings and to correct the abuse of laxity in such proceedings.

In the case of *United States* v. *Kolodner*, 199 Fed. 809, the court approvingly quoted the first two sentences of the above, but justified the use of depositions under section 10. Reversing the case on other grounds, the Third Circuit Court of Appeals (204 Fed. 240) expressed the same views as to the effect of section 9. *In Re Guliano*, 156 Fed. 420, and *United States* v. *Doyle*, 179 Fed. 687, are to the same effect.

By virtue of section 3 of the Act, certain courts have jurisdiction "to naturalize aliens as citizens of the United States." Instead of thus leaving the matter Congress saw fit to attach to the exercise of the jurisdiction the express condition found in section 9. That this condition has not been more frequently discussed by the courts may be attributed to the uniformity with which they have deemed strict compliance therewith indispensable to a valid judgment of naturalization. Where naturalization has been granted in disregard thereof, it is illegally procured within the contemplation of section 15. That the matter was called up at a regular session of the court can not operate against such result where, as in this case, the *hearing* was *actually had* before the *judge in chambers*.

THE THIRD QUESTION.

THE STATEMENTS REQUIRED TO BE SET FORTH IN A PETITION FOR NATURALIZATION BEING OF FACTS WHOLLY WITHIN THE PERSONAL KNOWLEDGE OF THE APPLICANT, THE LAW PRESUPPOSES THAT THEY SHALL BE TRULY STATED.

Subdivision 2 of section 4 provides for a petition in writing "signed by the applicant in his own handwriting and duly verified," by the oath of the applicant and by the affidavits of "at least two credible witnesses" who "have personally known the applicant to be a resident of the United States for a period of at least five years continuously." The section further expressly provides that the applicant shall state "every fact material to his naturalization and required to be proved upon the final hearing of his application" and that it must appear to the satisfaction of the court admitting any alien to citizenship, "that immediately preceding the date of his application he has resided continuously within the United States five years at least." It has, therefore, been held that continued residence within the United States for the requisite period antedating his petition, is a material fact to be established by the applicant on the final hearing, and that it must be set forth in the petition. This is confirmed by the form of the petition prescribed in section 27 of the act. In *United States* v. *Dupont*, 176 Fed. 823, the defendant was indicted for falsely stating in her petition that she had resided in Oregon for one year prior to the date of her petition; and the indictment was sustained.

In the case of *In re Aprea*, 158 Fed. 702, the petition was verified by the affidavit of Guiseppe Silvestri and Alberto Ventri. At the final hearing in open court Ventri admitted that he had surrendered his own certificate of naturalization for cancellation, having concluded it had been procured in violation of law, and the witness Silvestri admitted that he had not known Aprea for five years prior to the filing of his petition. In denying the application Judge Lacombe said:

> The petition in this case has not been verified in the manner prescribed by the statute, since the witness Ventri is not a citizen of the United States. It complies with the letter of the statute, so far as the witness Silvestri is concerned, since he did "state in (his) affidavit" that he had known the petitioner the requisite time. By admitting, however, that this statement was inaccurate, the witness has deprived his statement of any probative force, and it would not be a fair compliance with the spirit of the statute to accept a petition thus verified as sufficient.

The requirements that the petition shall be signed by the applicant in his own handwriting and *duly verified*, and that the petition shall be verified by the *affidavits* of at least two *credible* witnesses imply consonance of the statements therein made with truth. That which is implied in a statute is as much the law as that which is expressly stated. *Luria* v. *United States*, 231 U. S. 9, 24. When the allegations of a

petition and of its verifying affidavits are, as in this case, admittedly false *in toto*, there is manifestly not a compliance with the spirit of the law, notwithstanding such petition and affidavits may on their face meet the letter thereof.

The provisions under consideration require that the applicant must see to it that the petition and supporting affidavits comply with the conditions prescribed by the statute. If he executes a petition or his witnesses subscribe to affidavits which are essentially untrue as to the residence of the applicant in the United States, it may well be said that such wanton neglect of duty on the part of the applicant constitutes "fraud" for which a court would be warranted in canceling the certificate based thereon. Residence in the United States for the prescribed period is vital and knowledge of such residence goes to the competency of the verifying witnesses. False statements as to such residence can hardly be regarded otherwise than a travesty upon the plain purpose of the law.

THE FOURTH QUESTION.

UNLESS THE CONDITIONS PRESCRIBED BY CONGRESS REGULATING THE ADMISSION OF ALIENS TO CITIZENSHIP IN THE UNITED STATES ARE OBSERVED, THE COURT'S ORDER GRANTING THAT RIGHT IS SUBJECT TO REVIEW IN THE MANNER PROVIDED FOR BY SECTION 15 OF THE NATURALIZATION ACT.

Section 4 of the act declares:

> That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise.

Because lacking power to confer citizenship otherwise than in accordance with the terms of the act courts have, generally speaking, denied petitions for naturalization when it appeared that there was no compliance with or a material departure from the statutory requirements. Under the present law the courts, with few exceptions, have sustained suits for the annulment of certificates of naturalization on the ground that they were "illegally procured." In *Tiedt* v. *Carstensen et al.*, 61 Iowa, 334, the court said:

> We are, therefore, only to inquire when is a tribunal "acting illegally" in the contemplation of the statute? When the law prescribes proceedings to be had by an officer or tribunal in cases pending before them, the omission of such proceedings is in violation of law, and the court or officer omitting them would, therefore, act illegally. In a word, if a tribunal, when determining matters before it which are within its jurisdiction, proceeds in a manner contrary to law, it acts illegally. But if a discretion is conferred upon the inferior tribunal its exercise cannot be illegal.

United States v. *Anderson*, 169 Fed. 201, is opposed to the view that section 15 authorizes the cancellation of a naturalization certificate for error. In *United States* v. *Plaistow*, 189 Fed. 1006, the court, declaring the *Anderson* case to be against the weight of authority, said:

> But Congress clearly intended to provide procedure for nullifying certificates fraudulently obtained, and for correcting misinter-

> pretations or misapplications of the acts of the courts. The term "illegally procured," is not limited to irregularity of procedure, but also denotes the determination by the court contrary to law of the matter submitted to it.

In *United States* v. *Simon*, 170 Fed. 680, (cited by this court in the case of *Johannessen* v. *United States*, 225 U. S. 227), the court used the following language:

> The respondent contends that this court is without jurisdiction to vacate an order or decree of naturalization granted by another court which had jurisdiction of the subject matter. But the language of the statute explicitly contradicts this contention. The act gives jurisdiction to cancel the naturalization certificate, not to the court which granted it, but to any court of naturalization in the district of the residence of the naturalized person. Whether any jurisdiction, therefore, existing in the former court is thus taken away need not be discussed here. * * *
>
> If, however, the state court was not imposed upon, but acted with full knowledge of the facts, it must have found as a fact that Simon's residence in the United States for five years preceding his naturalization of April 20, 1901, was substantially unbroken. Therefore, it must have ruled as a matter of law that the British naturalization, which was obtained upon his application within these five years, did not interrupt the running of the statutory period of his residence in the United States. If the State Court proceeded upon this ground, I must hold that it erred in matter

of law, and so that Simon's naturalization was "illegally procured."

In *United States* v. *Kolodner*, 204 Fed. 240, the Third Circuit Court of Appeals said:

> This conclusion may be, and doubtless is, a hardship imposed upon the applicant in this case. We may not, however, in order to avoid the hardship of a particular case, relax the strict requirements imposed by the law-making power upon those who seek to obtain the privilege of citizenship in the United States, or impair in any degree, by judicial interpretation, the safeguards sought to be thrown around the citizenship of the country.

In *United States* v. *Leles*, 227 Fed. 189, 192, the court said:

> It is further urged that the complaint discloses upon its face that the matters counted upon as the basis of the alleged invalidity of the defendant's certificate of naturalization are in the nature merely of irregularities in the proceedings of the court, which may only be corrected on appeal, and further, that the order of the court granting naturalization is in the nature of a final judgment, which likewise may be attacked only by direct appeal therefrom, and is not open to collateral attack. But these contentions are fully met and negatived by the principles announced in *Johannessen* v. *United States*, 225 U. S. 227, 238. * * *

In *United States* v. *Dolla*, 177 Fed. 101, the Fifth Circuit Court of Appeals held there was no right of

appeal in naturalization cases, and that the exclusive remedy whether for fraud or error is that provided by section 15. The same conclusion was reached by the Third Circuit Court of Appeals in *United States* v. *Neugebauer*, 221 Fed. 938, wherein the court said:

> In the court below Ignatz Neugebauer the defendant in error, was on his petition admitted to citizenship and from such decree the United States sued out this writ of error.
>
> The question of this court's jurisdiction is now raised, it being contended there is no statutory authority for the United States suing out such writ. This question was considered by this court in United States v. Martorana, 171 Fed. 397, 96 C. C. A. 353; but inasmuch as it was raised by ourselves, and we had not the benefit of argument, the case was decided on the merits. In the present case our jurisdiction is challenged, and the question of jurisdiction has since then been decided adversely in United States *v.* Dolla, 177 Fed. 101. * * *
>
> In view of the weight of the reasoning of that opinion, and the desirability of conformity, for it would be exceedingly unfortunate if a right of review should exist in one circuit and be denied in another, we have decided to follow the Circuit Court of Appeals of the Fifth Circuit in that case, and accordingly we dismiss this writ of error for want of jurisdiction.

To the same effect is the decision of the Supreme Court of the State of Washington in *State* v. *Superior Court King County*, 134 Pac. Rep. 916.

Careful examination discloses no decisions of any Circuit Court of Appeals in conflict with the *Dolla* and *Neugebauer* cases, *supra*, upon the question of the method of reviewing naturalization proceedings. Although direct appeals have in several instances been entertained it is to be noted that in none of those cases was the jurisdiction of the Circuit Court of Appeals to so hear the matter challenged. Some state courts have taken the opposite view. *United States* v. *Hrasky*, 240 Ill. 560; *United States* v. *Breen*, 120 N. Y. Supp. 304; *State* v. *District Court*, 107 Minn. 444; and some United States District Judges have declined to follow the doctrine of the *Dolla* and *Neugebauer* cases, notably Judge Amidon in *United States* v. *Lenore*, 207 Fed. 865. But these last cases are against the great weight of authority as above indicated, which is reinforced by the cases of *Johannessen* v. *United States*, 225 U. S. 227, and *Luria* v. *United States*, 231 U. S. 9. In the *Johannessen* case this court said:

> Whether the judicial review of a certificate of naturalization should be conducted in one mode or another is a matter plainly resting in legislative discretion. * * *
>
> * * *. The act in effect provides for a new form of judicial review of a question that is in form, but not in substance, concluded by the previous record, and under conditions affording to the party whose rights are brought into question full opportunity to be heard.

And in the *Luria* case this court said:

> Several contentions questioning the constitutional validity of section 15 are advanced, but all, save the one next to be mentioned, are sufficiently answered by observing that the section makes no discrimination between the rights of naturalized and native citizens, and does not in anywise affect or disturb rights acquired through lawful naturalization, but only provides for the orderly cancellation, after full notice and hearing, of certificates of naturalization which have been procured fraudulently or illegally. It does not make any act fraudulent or illegal that was honest and legal when done, imposes no penalties, and at most provides for the annulment, by appropriate judicial proceedings, of merely colorable letters of citizenship, to which their possessors never were lawfully entitled.

Section 2170 R. S. (not repealed by the above mentioned act, *United States* v. *Rodiek*, 162 Fed. 469), provides that:

> No alien shall be admitted to become a citizen who has not for the continued term of five years next preceding his admission resided within the United States.

The right to attack a certificate of naturalization for lack of requisite precedent residence, notwithstanding there was no allegation of fraud, has been upheld by the Circuit Court of Appeals. In *United States* v. *Cantini* 212 Fed. 925, the Third Circuit Court of Appeals set aside an order of the District Court dismissing an action to cancel a certificate of

naturalization in which action it was alleged that the defendant within five years immediately preceding the date of his petition was out of the United States for about a year and eleven months under circumstances which deprived the court of jurisdiction to admit him to citizenship. It was not claimed that the defendant was party to a fraud or that he concealed from the court any of the facts upon which the Government based its action. In *United States* v. *Patrick Mulvey*, 232 Fed. 513 (on appeal from the judgment of the District Court dismissing an action for cancellation on the ground that at the time the defendant applied for citizenship he had not resided in the United States for five years) the Second Circuit Court of Appeals set aside the order of the lower court. In the course of its opinion the court said:

> Actual residence within the country for a little over half of the required time and a constructive residence for the balance of the time is not a compliance with the Act of Congress.
>
> * * * * *
>
> It is conceded that no fraud was practiced on the court. And it is said that, while the certificate in this case may have been erroneously granted, it was not illegally procured, and that therefore the right to proceed by petition does not exist. We do not agree to that view of the statute. The word "illegal" means contrary to law, and therefore we think the word as employed in this particular statute may be construed to mean that, whenever an alien has obtained a certificate of citizenship which is unauthorized by the Naturalization

> Act, he has procured it illegally, or contrary to law. Every statute must be construed with reference to the object intended to be accomplished by it. In order to ascertain this object it is proper to consider the occasion and necessity of its enactment and the statute should be given that construction which is best calculated to advance its object.

In *United States* v. *Ness*, 230 Fed. 950, the Government sought to have the defendant's citizenship canceled as illegally procured because he failed to file with his petition a certificate from the Department of Commerce and Labor as to his arrival in the United States, as provided for by section 4 of the act. The order of the lower court dismissing the action was affirmed by the Eighth Circuit Court of Appeals. That court, however, plainly distinguished between such an omission and a failure to meet the requirement as to residence, declaring the latter to be an essential the lack of which constituted illegality. In *United States* v. *Rockteschell*, 208 Fed. 530, the Ninth Circuit Court of Appeals affirmed an order dismissing an action to cancel a certificate of naturalization on the ground that the applicant had not complied with the requirement as to residence in the United States. There is an implication, however, that a different conclusion might have been reached had it appeared that there had not been a substantial compliance with the law.

In the present case the undisputed fact, certified to this court is, that during the five years imme-

diately preceding the filing of his application the applicant had been "actually and physically resident within the United States but fifty-eight days." If a certificate based upon such flagrant disregard of plain statutory requirements may not be set aside under section 15, the section is of little service. That the words "illegally procured" as used in section 15 were designed to embrace erroneous determinations by the court, finds support in the thought that it is difficult to conceive of an illegality in naturalization proceedings for which the alien may be held responsible, which would not at the same time involve fraud on his part.

To view the question of residence as largely one of intention would in many instances defeat the manifest purpose of the act. The mere declaration of intention to become a citizen of the United States neither destroys the alien's former allegiance nor establishes his residence in this country, whatever his intention for the moment may be. Moreover, the second subdivision of section 4 of the act provides that the verifying witnesses "shall state in their affidavits that they have personally known the applicant to be a resident of the United States for a period of at least five years continuously," and also "that they each have personal knowledge that the petitioner is a person of good moral character;" and by the fourth subdivision of the same section it is provided that it shall "appear to the satisfaction of the court admitting any alien to citizenship" by the tes-

timony of at least two witnesses, in addition to the oath of the applicant, "that immediately preceding the date of his application he has resided continuously within the United States five years at least * * * and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." The foregoing provisions as to residence are so related to those concerning the good moral character of the applicant that the intention of the alien with respect to his residence can hardly in itself be regarded as a material element where, as in this case, the witnesses are obviously wholly incompetent to testify as to the alien's moral behavior during the prescribed period of residence here, for the all sufficient reason that with the exception of about two months he was not in this country.

In the exercise of its constitutional power Congress has declared in clear terms the conditions under which aliens may become naturalized as citizens of the United States. Nowhere in the Act is there a suggestion of power in the court or elsewhere, to in any manner waive a compliance with the prescribed conditions. In *United States* v. *Nopoulos*, 225 Fed. 656, involving a certificate of naturalization granted under the provisions of section 3 of the Act of June 25, 1910 (36 Stat. 830), which act dispensed with a declaration of intention in certain circumstances therein specified, Judge Wade in ordering cancella-

tion of such certificate used the following pertinent language:

> The petition filed in this action alleges both "fraud" and "illegality." It is not necessary to determine whether there was actual fraud or not; it is sufficient if the facts show that the applicant was not at the time entitled to citizenship. Of course, in a proceeding of this kind, this court, upon all questions of fact, would indulge in the presumption that the findings of the lower court were correct; but in this case there is no dispute in the facts. It appears conclusively that the defendant was not entitled to naturalization.
>
> * * * * *
>
> I have given consideration to the estoppel pleaded by the defendant, based upon the fact that a representative of the Bureau of Naturalization was present at the time of the hearing before the District Court. The statute requires certain conditions to exist in order to entitle a person to naturalization, and no person, and no bureau, and no court, can waive these conditions; * * *.

CONCLUSION.

It is respectfully submitted that the first question certified by the Circuit Court of Appeals should be answered in the negative and the other three should be answered in the affirmative.

WILLIAM WALLACE, Jr.
Assistant Attorney General.

DECEMBER, 1916.

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IN THE

In the Supreme Court

of the

United States

OCTOBER TERM, 1916.

THE UNITED STATES OF AMERICA,
Appellant,
v.
SOLOMON LOUIS GINSBERG,
Respondent.

No. 401

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

POINTS IN ARGUMENT FOR RESPONDENT.

I.

Congress intended, under the Naturalization Act of June 29, 1906, as amended by Act of June 25, 1910, that the proceedings for naturalization should be an open court judicial determination of the applicant's constitutional right to naturalized citizenship, which, if in favor of the applicant, would vest in him

this right with all the authority, finality and conclusiveness of a judgment of a court of record upon any other personal or property right.

II.

The new Naturalization Act was not intended to be, and is not, a scheme and system complete within itself, but provides for naturalization by judicial procedure under established rules, except where the established rule is expressly modified, or nullified by substitution.

III.

The proceeding under Section 15 is the only remedy provided in the Act for attacking the validity of a certificate of citizenship. It does not purport to be the exclusive remedy that may be used for such purpose. It is in derogation, to a certain degree, of the fundamental and established rules of judicial procedure, hence it must be confined to its plain, self-evident terms, and used only when applicable by its plain terms. When this special proceeding is not applicable, the established rules of judicial procedure must prevail.

IV.

By its plain terms the remedy under Section 15 is to be used in attacking the validity of the certificate when the certificate has been "fraudulently or illegally procured;" or, as provided in the second paragraph of Section 15, when the certificate is for-

feited by voluntary expatriation; that is, the remedy is to be used when the responsibility for the alleged invalidity of the certificate is charged against the *procurer* of the certificate.

It cannot be used when the basis of attack on the validity of the certificate is some alleged illegality, judicial error, or misapplication of the law for which the court is responsible. The established rules of judicial procedure are adequate in such instances.

V.

"Fraudulently or illegally procured" means that the applicant, by actual or constructive fraud upon the court, has deceived or misled the court into decreeing to him the certificate when he was not entitled to it. No one can plead the principles of estoppel or of *res adjudicata* in support of his own wrongdoing, hence, under the construction given this remedy in *United States v. Johannessen,* 225 U. S. 227, that the fraud, actual or constructive, of the prevailing applicant, which can be shown under this special proceeding may be either extrinsic or intrinsic the record, it follows that the principles of estoppel and of *res adjudicata* cannot be pleaded against the Government in this proceeding, as was decided in *U. S. v. Spohrer,* 175 Fed. 440.

VI.

If the new Naturalization Act is a complete system and scheme within itself and Section 15 provides the general and exclusive proceeding for attacking

the validity of certificates of citizenship, whether for fraud or illegality of the procurer, or for alleged illegality of the court; or for review and correction of judicial error of law or fact, or for any cause for which the procurer cannot be held responsible, then the right of naturalized citizenship cannot become a vested right but must ever remain a mere grant of political privilege subject to be revoked at any time by attack upon its validity under the proceeding provided by Section 15, and thereunder may be cancelled by the judge of any co-ordinate court before whom it is brought who may differ with the trial judge upon any question of fact or law involved.

ARGUMENT.

QUESTION ONE.

"Open court," as used in Section 9 of the Naturalization Act of June 29, 1906, means a court of record sitting as such and performing its functions in term time upon matters of "open court" jurisdiction, as distinct from a judge or judges of the court sitting at any time in chambers to determine matters subsidiary and of "in chambers" jurisdiction, which do not require the participation of other officers of the court and are not matters for the official record of the court.

Bouvier's definition quoted in the brief for the Government supports this proposition, as do all the other authorities there cited.

Section 9 of the Judicial Code (Sec. 574, R. S.), in declaring that the district courts sitting in *equity* or *admiralty* shall be deemed to be "always open" for the transaction of certain business, does not mean that the judge and other officers of the court shall always be formally convened in the court room to constitute a continuous "open court" for the transaction of this certain business. A court of record during term time may take a recess from one hour to another and still remain an "open court" until adjourned at the end of the term.

Counsel for the Government seems to insist that the sole office of the words "open court" is to secure publicity of the hearing upon naturalization petitions and upon the taking of the final oath by the petitioner.

Is it not rather that the whole of the provisions of Section 9 are for the purpose of making of the hearing upon the petition, the order of the court thereon, and the final oath by the petitioner a judicial proceeding, or solemn court function, as the trial and determination of any other "case" in open court would be?

Section 2222 of the Code of Iowa, authorizing and governing proceedings for divorce, contained, in 1877, the following provision.

> "No divorce shall be granted on the testimony of the plaintiff; and such actions shall be heard in *open court* on the testimony of witnesses, or depositions taken as in other equitable actions triable upon oral testimony, or by a commissioner appointed by the court."

In *Hobart v. Hobart*, 45 Iowa 503, the Supreme Court of Iowa, construing this provision, decided that publicity of hearing was not the primary purpose of this "open court" provision, but that the hearing and determination of the case by the court itself, and not by a referee as might be in other cases, was the purpose and effect of the provision. A public hearing and decision by referee did not meet the

requirement. Publicity of all court trials is required by law.

The terms of Section 6 of the Act of June 29, 1906, provide that a petition for naturalization may be filed either during term time or vacation of the court, but the provisions of Section 9, in effect, require that the hearing upon the petition, the final order thereon, and the final oath of the petitioner, shall not be in vacation as an "in chambers" proceeding but in term time of the court, as an "open court" function.

In *Von Schmidt v. Widber,* 99 Cal. pp. 512, 516, is a learned historical review of the development of the distinction between "open court" functions and "in chambers" proceeding, to show that the judicial determination of the issues presented by the pleadings, and all matters which formed a part of the official record constitute "in term time" court functions.

The authorities cited in the brief for the Government, which hold that officers of the court paid by per diem fees for attendance upon the court, "while it is in session," cannot claim per diem fees for the days during the term when the court is not in session, are not pertinent. While a court of record is always an "open court" during term time it is not always in session; that is, attending to business. Technically speaking, after the court is duly opened at the beginning of the term, it does not "adjourn" until the term is ended. It may take a re-

cess during the noon hour, over night, or over certain days, but it is not a closed court until adjourned for the term. When it is attending to business during the term on matters of "open court" jurisdiction it is in session, whether it be day or night, before nine o'clock in the forenoon or thereafter on that day, at one room in the building, or another; the only limitation being the time of the term and the place of holding court "designated by law."

The hearing upon this petition had been passed from the regular "open court" session of the preceding night, because of the failure of the naturalization examiner to be present at the time on due notice, and by publicly announced order of the court set for special hearing at an hour earlier than the usual time for the beginning of the day's session of court, for the purpose of expediting the pressing business of the court. The true test on this per diem fee proposition would be in determining whether or not the marshal and clerk, who attended this special sitting of the court at that early hour and performed their usual duties at the hearing upon this petition, could claim their per diem fees for that day, if no other business of the court had been transacted on that day. To state this proposition is to answer it in the affirmative.

It is an elementary principle that a court of record, while sitting as such and performing its functions, is presumed to be lawfully assembled.

State v. Bush, 136 Mo. App. 608.

We join with the Government's counsel in insisting that the final hearing on the petition as provided in Section 9 must be an open court proceeding, but also insist that the record shows this hearing to have been such, and that it was not an "in chambers" proceeding. It was during term time and was a hearing reset from a confessedly regular session of the court at a time and place publicly announced by the court. The members of the court, other than the judge, were present. The subject-matter was not of "in chambers" jurisdiction.

The procurer of the certificate was not in any manner responsible for any alleged irregularity or illegality in the time and place set by the court for this final hearing.

The invalidity, or error, if any, in the proceeding was immediately apparent. It could promptly have been called to the trial court's attention by motion for rehearing. The Naturalization Bureau's representative had already entered appearance of the Government to contest the case. The United States district attorney had answered for the Government on the regular call of the case for hearing at the night session of the court, and the resetting of the hearing on the petition was at the instance of the Government.

The regular judge of the court, Hon. A. S. Van Valkenburgh, in his decision upon this proceeding under Section 15, says:

> "That due announcement and notice to the Government had been given of the special morning sitting of the court to hear and act upon this petition, and it is sufficiently established that the requirements of our open court proceeding were substantially observed" (Rec. p. 25).

But why should counsel for the Government, in his brief, insist upon the idle ceremony of an open court hearing in all its technical forms if the result is to be the mere grant of a political privilege, as laid down by his favorite authorities, *United States v. Dolla,* 177 Fed. 101, and *United States v. Neugebauer,* 221 Fed. 938? If there is to be no protection to the naturalized citizen in what he acquires by the procedure, of a single principle of estoppel, or of *res adjudicata,* then naturalization in the United States might as well now be declared judicially to be an administrative or ministerial act, and the requirements as to open court judicial proceedings held for naught.

That is what judicial construction brought upon the proceedings for naturalization under the prior naturalization acts.

If the high standard of dignity, authority and conclusiveness of the judgment of the court in naturalization proceedings, as set by Chief Justice Marshall, in *Spratt v. Spratt,* and in *Osborn v. Bank,* had been maintained the disgraceful scenes which occurred in the St. Louis Court of Appeals and in other courts of the country, which brought about the pres-

ent enactments to prevent their recurrence, could never have been possible.

Chief Justice Marshall in construing the Act of 1802 in *Spratt v. Spratt,* 29 U. S. (4 Peters), at page 407:

> "The various acts on the subject (naturalization) submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge of both law and fact. This judgment is entered on record as judgment of the court. It seems to us, if it be of legal form, to close all inquiry; and, like every other judgment, to be complete evidence of its own validity."
>
> "The inconvenience which might arise from this principle has been pressed upon the court. But this inconvenience might be still greater, if the opposite opinion be established. It might be productive of great mischief, if, after the acquisition of property, on the faith of his certificate, an individual might be exposed to the disibilities of an alien, on account of an error in the court, not apparent on the record of his admission."

In *Osborn v. U. S. Bank,* 9 Wheat. at page 827, he says:

> "A naturalized citizen becomes a member of the society, possessing all the rights of a native citizen, and standing, in view of the constitution, on the footing of the native. The constitution does not authorize congress to enlarge or abridge those rights. The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, as far as the individual is concerned."

Thus citizenship by naturalization was adjudged to be a constitutional right, and the judgment of the court granting it was a vesting of this right, with the protection to the holder afforded by judgments of courts of record as to any other personal or property right.

If there is any "grace" in granting the right of citizenship by naturalization in this country its fullness was exhausted in the constitutional provision for it. There is no "grace" in the enactment by congress of uniform rules for naturalization; nor is there any "grace" exercised in a court adjudging the right of naturalization to a legally qualified applicant.

Congress, at the time of the enactment of the present Naturalization Act, had before it the report showing that naturalization in most countries, was an administrative or ministerial act generally exercised by certain administrative officers.

It must be concluded, then, that congress intended to make naturalization in the United States a judicial act when it conferred the power of naturalization upon certain of the higher courts, instead of conferring such power upon administrative officers or bureaus; and, in requiring that these courts have a clerk for making and keeping records of court proceedings, and a seal for authenticating such records, and made it mandatory that the hearing on the petition, the final order of court thereon, and the taking of the final oath of allegiance be a solemn open court

function, it must be concluded that congress intended there should be the conclusiveness and finality of a judicial proceeding as the result.

The authorities supporting this view are collected in 2 Vol. of Corpus Juris, p. 1120, Sec. 145, note 50. They need not be repeated here.

QUESTION TWO.

The special proceeding under Section 15 *is not the remedy for illegality, if any, as alleged in Question One, because the form of the question shows that the illegality alleged, if any, was not "procured" by any act for which respondent could be held responsible.*

The established rules of judical procedure are adequate to have prevented the issuance of the certificate, if the court committed any illegality or judicial error in the final hearing. The illegality or error, if any, was immediately apparent. A motion for rehearing, and appeal, or writ of error, within fixed time, to the higher court for review and correction, could have been invoked forthwith. The court had control over its record during the continuance of the term. Any illegality in the record could have been remedied on motion. If the illegality complained of is apparent from the record itself the established proceeding for relief in such instance can be invoked. It is not only doing violence to the established rules of judicial procedure but it is also a violation of the rules of common justice to respondent for the legal representatives of the Government

to stand by while the certificate was being illegally issued, if it was illegally issued, accepted by respondent in good faith, held and enjoyed by him while the term of court lasted, and then, when the term is closed, to have this complaint under Section 15 filed against him charging him with constructive fraud at least in "procuring" the certificate on the ground that the court, without any fault on his part, did not give him an open court hearing on his petition. To recite these facts is to show the absurdity of the attempt to apply this remedy in such instance. Furthermore, filing this complaint after the end of the term, when the court record is made up and closed, is calling upon the court to impeach its own record; or, if this complaint had been filed in some co-ordinate court it would have been calling upon such court to impeach the record of the co-ordinate trial court.

To permit the direct impeachment of the record of a court of record under Section 15, by a court of co-ordinate jurisdiction, or by a court itself of its own record after adjournment of term, is contrary to, and subversive of, all rules of established judicial procedure. This applies whether the record of the court is of a judgment, or of a grant. It applies to all parts of the record proper of the proceeding. *United States v. Stoller,* 180 Fed. 910; *United States v. Mayer,* 235 U. S. 55, 67. The question as to what constitutes a record of naturalization considered. *In re* Coleman (C. C. 1879), Fed. Cas. No. 2,980.

The proceedings in all cases for naturalization under Act of June 29, 1906, generally, and in this case particularly, is, and was, not only an open court proceeding, but also, in substance, if not in form, an adversary proceeding. It is admitted that under prior acts, by judicial construction, the naturalization proceeding had been relegated to the position of an *ex parte* "in chambers" proceeding.

We maintain that the inevitable result of this was the abuses set out in *United States v. Peterson,* 182 Fed. 289, and *Dolan et al. v. United States,* and *Barrett v. United States,* 133 Fed. 440; and that to correct these abuses the Act of June 29, 1906, was enacted after thorough investigation by special commission, with recommendations and suggestions from all available sources. (See page 11 of brief for the Government.)

The distinct differences in naturalization proceedings under prior acts and under the present act is the change from "in chambers" jurisdiction to "open court" jurisdiction, and the change from *ex parte* to adversary case.

If these distinguishing differences are not maintained, and the established principles and rules of judicial procedure of open court jurisdiction and adversary case applied by construction of the present act, then the evident purpose of the act has failed.

The line of demarcation is shown between the opinions of those courts which follow the course of

reasoning and yield to the authority of *United States v. Dolla,* 177 Fed. 101, and *United States v. Neugebauer,* 221 Fed. 938, and the opinions of those courts in line with *United States v. Lenore,* 207 Fed. 867, which are of much greater weight both as to numbers and as to convincing reasoning. This is also illustrated by the distinguishing qualities between the prevailing opinion and the dissenting opinion in *United States v. Mulvey* (C. C. A., 2d Circuit, April 18, 1916), 232 Fed. 513.

Counsel for the Government in his brief favors the views expressed in the *Dolla, Neugebauer,* and prevailing opinion in the *Mulvey,* cases. This means that in his view Section 15 provides the exclusive process for cancellation of the certificate of citizenship and for reviewing naturalization proceedings. This is logical.

In the opinion in the *Dolla* case at page 104, it is admitted that if the naturalization proceedings under Act of 1906 constitute a "case" "then it must follow that all applications for naturalization in all courts, state and federal, are reviewable by appeal or writ of error, as the several judiciary acts may read, at the suit of the rejected applicant or the United States."

We contend that naturalized citizenship is not a mere privilege, the granting of which is an act of grace by the court, but is a constitutional right, not to be enlarged or abridged even by Congress any

more than Congress can enlarge or abridge the right of citizenship by birth, and that the only power of the court is to ascertain and determine whether or not the applicant is legally entitled to this right, if so, to vest it in him with all the authority and finality that a court of record can vest any other personal or property right in a suitor.

The Supreme Court of the United States in the *Johannessen case,* 225 U. S. at page 237, suggested the distinction between the naturalization proceeding under prior acts and that under the present act. In that case the proceeding under the present act did not concern the court.

In this case the naturalization proceeding under the present act is to be distinguished, construed and applied. We await with confidence a decision which will give to the legal holder of a certificate of naturalized citizenship under the present act something of value and permanency.

If the decision of the court on the final hearing of the petition for naturalization be a judgment and binding upon the applicant under Act of June 29, 1906, as decided *In re Centi* (D. C., W. D., Tenn., Oct. 1, 1914), 217 Fed. 834, and *In re Hartman* (D. C., N. D., Iowa E. D., May 4, 1916), 232 Fed. 797, it must be so mutually to the applicant and the Government.

Repeated applications for naturalization would

be the effect, if the result of the proceeding for naturalization is not a judgment.

In re Guliano, 156 Fed. 420, 421.

QUESTION THREE.

It is not fraud, either actual or constructive, on the part of the applicant, in procuring the certificate, under the facts submitted in Question Three.

If there was any wrong at all it was an error of law or fact committed by the court in judicially determining the fact of residence in the applicant's favor without fault, either of omission or commission, on the part of the applicant. It was, if wrong at all, judicial error either of law or fact, and was immediately apparent when the decision was made. The established rules of pudicial procedure are adequate to have prevented the issuance of the certificate if judicial error was committed in this decision. On motion for new trial, and appeal or writ of error, the decision could have been reviewed and corrected by higher court, prior to issuance of any certificate; but the legal representatives of the Government stand by, allow the certificate to be issued and held by the applicant until after court adjourns for the term, and then file complaint against the holder, under Section 15, charging him with the "illegality," or constructive fraud, in "procuring" the certificate.

Is it conceivable that Congress deliberately intended to enact a provision requiring such a judicial absurdity?

In *United States v. Salomon* (C. C. A. Fifth Circuit, April 14, 1916), 231 Fed. 928, it is held that the affidavit for instituting cancellation proceeding under Section 15 should do more than point out errors of law in the procedure which led up to the naturalization.

In the fourth subdivision of Section 4 of the act the three facts of residence, moral character and attachment to the principles of the constitution are placed on a par as to pleading, proof and requirement as to essentiality in the granting of naturalized citizenship. These facts are not self-evident. They all require proof. No one of them is absolute as to definition. They are individually made up of many elements. No two judges could possibly agree absolutely as to the different elements necessary to constitute, or the sufficiency of the evidence necessary to prove, any one of these facts, hence judicial discretion must be allowed in their determination and when so determined they are "facts in law." Shall difference of judicial opinion as to any one of these "facts in law" be made a basis whereby the holder of a certificate of naturalization may have it cancelled at any change of residence from one judicial district to another, or at any change of judge of the court which granted him the certificate? Where does the finality lie as to the sufficiency of proof of any one of these "facts in law," or of the elements which constitute such fact?

Does the clause in this same subdivision stating that: "It shall be made to appear to the satisfaction

of the court admitting any alien to citizenship" as to existence of these facts mean anything?

Or does it mean that it must also appear to the satisfaction of every other co-ordinate court before which this special proceeding to cancel may be brought?

A difference of judicial opinion may well be imagined upon the question of constructive residence and intention to maintain legal residence as a basis for admission to citizenship in this country of an alien. The statute law is not specific upon this point. The decisions of the courts thereon vary widely. It certainly cannot be held that the decision of the special trial judge on this question in this case is so far outside of, and contrary to, the law as to constitute usurpation of power. This point is well examined and discussed, and the leading authorities cited by Judge Whitson in *United States v. Meyer,* (D. C.), 170 Fed. 983. See also *In re Deans* (D. C., W. D. Ark. E. D., Dec. 1, 1913), 208 Fed. 1018, and affirmed with able opinion written by Judge Sanborn (C. C. A. Eighth Circuit, Feb. 16, 1916), 230 Fed. 957, 960.

The brief for the Government does not contend that "five years' continuous residence is jurisdictional" in a proceeding for naturalization, as do some of the court decisions. See *United States v. Grimminger* (D. C., N. D., Ohio, W. D., Oct. 12, 1916), 236 Fed. 925.

The test of jurisdiction is not right decision but the right to enter upon the inquiry and make some decision.

Jurisdiction of the subject-matter is the power to deal with the general abstract question.

United States v. Ness (C. C. A. Eighth Circuit, Feb. 16, 1916), 230 Fed. 950, 953.

QUESTION FOUR.

The remedy under Section 15 *is not applicable to review and correct judicial error, either of law or fact, because the fundamental established rules of judicial procedure are adequate to prevent the granting and issuance of certificate of citizenship impregnated with such illegalities, and, because this remedy by its express terms, is applicable only to cancel certificate already issued, where it has been procured by fraud or illegality for which the applicant is responsible, and which became apparent after the certificate was issued.*

In the enactment of the Act of June 29, 1906, the legislators evidently had in mind the distinctions between the terms "procure," "admit to" and "issue" as applied to certificates of citizenship. Section 15 provides for cancellation of a certificate fraudulently or illegally "procured."

Section 23 provides penalties and criminal prosecution for "any person who knowingly 'procures' naturalization in violation of this Act" or "who

knowingly aids, advises or encourages any person not entitled thereto to 'apply for or secure' naturalization."

It must necessarily be that the same class of persons is covered by both these sections. Any other construction would involve confusion.

Section 18 makes it a felony and provides heavy penalties for "any clerk or other person to 'issue' or be a party to the 'issuance' of certificate of citizenship contrary to the provisions of this Act."

The term "grant," with reference to the judicial determination of the right of naturalized citizenship, is not used in the act, but the term "admit to citizenship" is applied to the final decision of the court adjudicating the right of the applicant to naturalization.

These three distinct terms apply to three different acts and three distinct and different actors in the proceeding for naturalization.

The word "procure" means to acquire for one's self; to cause.

Vol. 8, Words and Phrases, p. 1245.

To bring about by care and pains; effect; contrive and effect; induce; cause; as "he procured a law to be passed."

United States v. Somers, 164 Fed. 259, 262.

The distinction between "fraudulently procured" and "illegally procured" is that between actual fraud and constructive fraud.

Actual fraud is intentional. "Illegally procured," or constructive fraud, is where the procurer has, by his own acts, contrary to law, misled the court and procured his certificate, not knowing that his acts were illegal, and with no fraudulent intent. As in the St. Louis cases (see *Dolan et al. v. United States,* and *Barrett v. United States,* 133 Fed. 440), where ignorant aliens were herded into court by designing politicians and put through the form of naturalization proceedings and received certificates without knowing that they were not legally qualified. The fraudulent intent of the conspirators, aiders and abetters in procuring these certificates would be imputed to the procurers themselves. This would be fraud upon the law—constructive fraud.

Any error or illegality, for which the court is responsible, could not be within this clasification. For "illegally procured" definition and authorities see 2 Vol. Corpus Juris, p. 1126, Sec. 155.

Neither actual nor constructive fraud of the procurer of the certificate would be apparent until after the issuance of the certificate. If it should become apparent in the course of the proceeding this would prevent the procuring of the certificate. Hence, we see the propriety of the remedy under Section 15 being restricted to the cancellation of certificates where

the fraud or illegality attached to them becomes apparent after their issuance.

All judicial errors either of law or fact, illegalities committed by the court, misapplications of the law by the court occurring in the course of naturalization proceedings are necessarily immediately apparent. The established rules of judicial procedure are adequate to prevent the issuance of the certificate in all such instances. Congress could not have intended that Section 15 provides the exclusive remedy, and that the Government must wait until the certificate is issued before action to forestall it can be taken.

The remedy under Section 15 must either be exclusive, or it must be kept from encroachment upon the established rules of judicial procedure for review and correction of judicial errors, or illegalities committed by the court. These rules recognize and support the principles of *stare decisis,* estoppel and *res adjudicata.* The remedy under Section 15 does not do this; and, on principle, this is just if the remedy be restricted to actual or constructive fraud for which the applicant is responsible.

If this remedy is made exclusive by judicial construction, as contended for in the brief for the Government, then indeed will naturalized citizenship become a mere political privilege subject to every changing gust of political opinion.

It is not difficult to imagine, if the Supreme Court in this case shall decide that the special proceeding under Section 15 is exclusive, and adequate to cancel any certificate of citizenship "illegally procured" by error of the court in passing upon either of the three facts required to be proven under subdivision four of Section 4 of the present Naturalization Act, to-wit, "residence," "moral character," or "attachment to the principles of the constitution" that many of our patriotic native-born citizens might be impelled to attack the slight tenure of naturalized citizenship held by some of their hyphenate fellow-citizens.

As an example of what the court must read into the provisions of Section 15 to make this remedy applicable to review and correct judical error, note, at page 786 of the opinion, the use of the terms "certificate illegally granted" and "certificate illegally issued," in *United States v. Leles* (D. C., N. D., Cali. 2d Div., Sept. 30, 1916), 236 Fed. 784.

For arguments, reasons and authorities why the principles of *res adjudicata, stare decisis,* and estoppel must apply to certificates of citizenship, and judgments and records of courts thereof; unless it should become apparent that fraud or illegality attaches to them for which applicants in procuring them are responsible, see brief by Mr. A. L. Agatin, Attorney and Counselor at Law of Duluth, Minn., filed herein.

DIGEST OF DECISIONS.

It is a commentary upon the accuracy of judicial decisions to note the divergence of constructions by the federal courts given this remedy provided by Section 15 of the Act of 1906. For the convenience of this court is here digested the cases reported, in their consecutive order as to date of decision. This is done to prevent repetition of citation under different points of the arguments. Few excerpts from any of the opinions are printed here for the reason that if the digest discloses that any decision is pertinent, the court would probably consult the entire opinion.

1. *U. S. v. Schurr* (D. C.; W. D., S. D., Mich., Aug. 4th, 1908), 163 F., 648: Charge that the certificate was "illegally procured" from the State Circuit Court of Osceola County, Mich., when applicant was a resident of Mason County, Mich. No question of the utmost good faith of the applicant. Decided that applicant was not a resident within the naturalization jurisdiction of the court which issued the certificate. Certificate cancelled.

Held: That the responsibility of bringing his cause of action to obtain naturalization certificate, in the proper jurisdiction, is upon the applicant.

2. *U. S. v. Wayer* (D. C.; W. D., S. D., Mich., Aug. 7, 1908), 163 F., 650: Same charge as above, same decision. Applicant was a resident of Allegan County, Mich., when he petitioned for and secured his certificate from the Circuit Court of Muskegon County, Mich.

3. *U. S. v. Van Der Molen* (D. C.; W. D., S. D., Mich., Aug. 10, 1908), 163 F. 650: Charge certificate "illegally procured" on the ground that less than two years intervened between the date of filing the declaration of intention and the date of making and filing petition of naturalization.

Held: That the requirement of two years between the dates of the two filings is mandatory. Certificate cancelled.

4. *U. S. v. Mansour* (D. C.; S. D., New York, Aug. 18, 1908), 170 F. 671: Affirmed by U. S. Supreme Court, Dec. 16, 1912, 226 U. S. 604, without written opinion.

Charge, "personal fraud" by the applicant which deceived the court into granting the certificate. Certificate cancelled. Second case before U. S. Supreme Court under this proceeding. No question as to jurisdiction here.

5. *U. S. v. Nisbit* (D. C.; W. D., N. D., Wash., March 31, 1909), 168 F. 1005: Charge certificate "illegally procured" from state court on the ground that applicant produced depositions of witnesses to prove residence, whereas the personal presence of

witnesses in court to prove this fact is mandatory outside the special exception within which this case did not come. Certificate cancelled.

Held: That the act of the state court in granting the certificate was a "misinterpretation and misapplication of the law." This is the first decision which holds that a federal district court under this proceeding can review and correct "an error of law" which a co-ordinate state court may have committed in granting certificate of citizenship.

6. *U. S. v. Anderson* (D. C.; C. D., Idaho, April 1, 1909), 169 F. 201: Charge "illegally procured" on the ground that the applicant filed his petition for naturalization, and was granted his certificate by the state court in and for Ada County, he being a resident at the time of Boise County, Idaho. Decided that the naturalization jurisdiction of Ada County District Court to grant this certificate involved the judicial construction of the Idaho statute and constitution, and, if there was any "illegality" in granting the certificate it was an error of law by the state court, which being a co-ordinate court and of concurrent jurisdiction in matters of naturalization with the federal district court, its decision cannot be reviewed and its error, if any, corrected by the federal court. This is an able, clear and convincing opinion by Dietrich, district judge, and takes the initiative in distinguishing the proper jurisdiction of federal courts under this proceeding.

7. *U. S. v. Simon* (C. C., Mass., May 25, 1909), 170 F. 680: Charge "illegally procured," but at the hearing (l. c., 682) it was assumed by both sides that the ground of "fraud" was open to the Government.

Held: That as Simon's naturalization was procured either "fraudulently or otherwise illegally" cancellation ordered. Court declined to pass on the question of whether or not it had the right to cancel the certificate on the ground that the state court of naturalization erred in findings of fact. A case of procuring certificate by fraud of the applicant clearly proven.

8. *U. S. v. Meyer* (D. C.; E. D., S. D., Wash., May 7, 1909), 170 F. 983: Charge "illegally procured." Petition of widow of deceased soldier filed in and granted by state court without first having made declaration of intention. She was the widow of a deceased soldier who had been honorably discharged, but he had never applied for admission to citizenship nor made a declaration of intention.

Held: Responsibility on the applicant to present a petition stating facts sufficient to entitle her to naturalization. Certificate cancelled.

See page 984 of the opinion for a good discussion of the line of damarcation between judicial error and usurpation of authority where a court having jurisdiction of the subject-matter and of the parties makes erroneous finding or mistake in judgment

which cannot be reviewed by court of no greater authority.

9. *U. S. v. Spohrer* (C. C., N. J., Jan. 14, 1910), 175 F. 440: Charge "fraud by the applicant."

Held: Fraud must be by the prevailing party, and practiced in the very act of obtaining the judgment. Decided that the defense of laches cannot be made against the Government in a suit to cancel naturalization certificate under this proceeding.

10. *U. S. v. Aakervik* (D. C., Oregon, June 20, 1910), 180 F. 137: Charge "illegally procured" on the ground that the five years' continuous residence required was erroneously adjudged by the state court granting the certificate. Facts as to residence not disputed except as to intent of applicant while absent during one year of the time in his native country, Norway. Decided that the state court committed error in granting the certificate, but holds that the Act of June 29, 1906, is unconstitutional in so far as it is made to apply to certificates issued prior to the passage of the Act for the reason that it provides for the annuling of the final judgment of a court of competent jurisdiction by independent direct proceeding on grounds other than fraud or other illegal acts for which the beneficiary of the judgment is responsible. Argued that it upsets established procedure of reviewing judicial errors by motion for new trial, and appeal or writ of error to higher courts within fixed time. It makes it impossible therefore for a holder of a certificate of naturalization, which may have been obtained in absolute good faith, and with-

out fraud, on his part, to know that his right, as a holder thereof has been finally adjudicated (see digest number 9 *U. S. v. Spohrer,* 175 F. 440, wherein it decided that the defense of laches cannot be pleaded against the Government in this proceeding.)

A very convincing line of argument, and one which this court might have used to predicate a decision that the "illegally procured" clause of this section means illegal acts of procurement for which the applicant is responsible. This would have avoided the constitutional objections.

11. *U. S. v. Plaistow* (D. C., W. D., New York, Aug. 2, 1910), 189 F. 1006: Charge "illegally procured" on the ground that four years had not elapsed between the time when the applicant enlisted in the marine corps and his honorable discharge.

Held: That the state court, which granted the certificate erred in construing the law, wherefore the certificate was unlawfully issued, and must be cancelled. Notes the cases deciding to the contrary, but thinks the weight of authority is in favor of the holding.

12. *U. S. v. Luria* (D. C., S. D., New York, Jan. 27, 1911), 184 F. 643. Affirmed by U. S. Supreme Court, Oct. 25, 1913, 231 U. S. 9.

Suit to cancel certificate of naturalization of alien who left the United States and took up permanent residence in South Africa one month after certificate was issued. Ground "personal fraud" of

applicant in that he never intended to become a permanent resident of the United States. Certificate cancelled. A good illustration of the purpose of the proceeding under this section; as prior to this enactment, there was no provision for cancellation of the certificate of a naturalized citizen who had subsequently expatriated himself.

Expressly decided by the district court, in arguing the constitutionality of this section, that "illegally procured" means procured by subordination of perjury or some other illegal means used to impose upon the court; it does not mean that the certificate was issued through error of law (l. c., 646-7). Third case under this proceeding before the U. S. Supreme Court, which affirms the decision of the lower court, and follows its ruling in *Johannessen v. U. S.*, 225 U. S. 227, on this point.

13. *U. S. v. Cantini* (D. C., W. D., Penn., Oct. 8, 1912), 199 F. 857. Review by C. C. A. Third Circuit, April 21, 1914, 212 F. 925: Charge "illegally procured" in that on the undisputed evidence there was no five years' continuous residence of the applicant, and that the court erred as a matter of law in finding that, under the undisputed evidence, there was the five years' continuous residence, and on this finding granting the certificate. The district court held that "under all the facts and the law applicable thereto, the court is of the opinion that the defendant's certificate of naturalization was not illegally procured." The opinon written by Orr, district

judge, is an able one showing thorough investigation of the subject and a course of reasoning incontrovertible. McPherson, circuit judge, in reviewing the opinion (l. c. 927) makes no attempt to refute the reasoning, but simply declares "that the question must of necessity be a question of fact in any given case," and that the circuit court of appeals is merely required to decide whether an inference of fact drawn by the district court from other conceded facts meets with their approval.

There is no authority cited nor reason given to support the decision of reversal. The question of using this proceeding under Section 15, Act of 1906, to take the place of appeal or writ of error seems not to have been raised. Respondent made no appearance in the appellate court. The authority of *Johannessen v. U. S.*, 225 U. S. 227, decided by the U. S. Supreme Court two years previous was not noticed.

The natural sequence is that, in the Third Circuit, *United States v. Neugebauer* (C. C. A., Third Circuit, January 12, 1915), 221 Fed. 938, follows the authority of *United States v. Dolla*, 177 Fed. 938, from the Fifth Circuit, and in these circuits naturalized citizenship is a "political privilege," granted by "grace" of the courts.

14. *U. S. v. Kolodner* (D. C., M. D., Penn., Oct. 26, 1912), 199 F., 809. Reviewed by C. C. A. Third Circuit, April 17, 1913, 204 F. 240: Suit to cancel certificate upon the specific ground that the court was not authorized to receive depositions

taken of witnesses residing within the state where the application was filed and being heard. The decision involved the construction of the clause, "state, territory or district" in the tenth section of the Act of 1906. The district court in its construction held that "district" in this clause meant "judicial district," and refused to cancel the certificate. On appeal the C. C. A. held that the word "district" in the clause meant District of Columbia, hence the proof by the depositions offered and admitted was illegal, and cancelled the certificate.

No answer to the bill to cancel was filed by respondent, and no contest was made by him on the appeal.

The question of whether or not the court, under this proceeding, had jurisdiction to construe the clause was not raised. Petition to cancel filed in the court where certificate was issued, as in the case at bar. The district attorney seems to have assumed that this proceeding was intended to take the place of motion for new trial and appeal or writ of error. *Johannessen v. U. S.*, 225 U. S. 277, decided five months before not referred to in the opinion of the appellate court. On pages 242 and 245 of the opinion naturalized citizenship as a "privilege" is emphasized.

15. *Johannessen v. U. S.* (Supreme Court of U. S., May 27, 1912), 225 U. S., 227: First case under this proceeding before the United States Supreme Court. Suit to cancel certificate on the ground

that it had been "fraudulently and illegally procured" from the Superior Court of Jefferson County, State of Washington, 1892. Facts of fraud not discovered by the government until June 29, 1908. Johannessen's affidavit made part of the petition wherein he admits that the certificate of citizenship was "illegally procured" in that he had not been a resident of the United States for five years at the time it was issued, and that his evidence to prove five years' residence was false.

Gist of the decision is that the fraud or illegality which would authorize the cancellation of a naturalization certificate by proceeding under Sec. 15, Act of 1906, must be that fraud or illegality for which the applicant is responsible. The application of this principle to certificates issued by proceeding under the present Act, as it is in above case by proceeding under prior Act, is what we contend for, with the additional adjudication that the judgment or decree of court under the present Act be given the authority and conclusiveness of an "open court" proceeding and adversary case.

16. *U. S. v. Albertini* (D. C., Montana, May 28, 1913), 206 F., 135: Charge that the certificate had been "illegally procured" in that there were fraudulent representations made by applicant in his petition for naturalization. Decided that neither the bill of complaint nor proof offered made out a case of certificate "illegally procured."

17. *U. S. v. Lenore* (D. C., N. Dak., Oct. 1, 1913), 207 F., 865: Charge "illegally procured" on the ground that the petition for naturalization was signed by "mark" of the applicant and not "in her own handwriting." Certificate issued by Dakota State Court. Bill dismissed on the ground that the term "illegally procured" does not cover an alleged error of law made by a court in ruling upon a point raised in the construction of a statute. Cites in support *Johannessen v. U. S.*, 225 U. S. 227, and concurs in the view expressed in *U. S. v. Luria* (D. C.), 184 F., l. c., 646, that "illegally procured" does not mean that the certificate was issued through error of law.

A complete resume of this history, causes and investigations which led up to the enactment of June, 1906, and a full and able discussion to show that judicial errors made by a court in granting and issuing certificate of naturalization must be reviewed by higher court on appeal or writ of error.

18. *U. S. v. Rockteschall* (C. C. A., Ninth Circuit, Oct. 31, 1913), 208 F., 530: Appeal from D. C., N. D., California, where bill to cancel was dismissed on demurrer. Government appealed. Certificate issued by the U. S. Circuit Court of the District of Mass. on June 26, 1906. Submitted without argument or briefs.

The ground relied upon to cancel the certificate is that the applicant had not resided in the United States continuously for the probationary period of

five years, was physically present in the United States only from 1894 to 1897, but subsequent to that time he was here only at irregular intervals and for comparatively short periods of time. No contention that since his arrival in 1894 he ever claimed a residence or home, or in fact resided in any other country.

Held: That it must be presumed there were before the Massachusetts court sufficient facts to warrant the finding. Inasmuch as the petition does not allege that the respondent deceived the court of original jurisdiction by misrepresenting or withholding any concrete fact it is insufficient and dismissal is affirmed.

19. *U. S. v. Ness* (D. C., N. D., Iowa C. D., Oct. 17, 1914), 217 F., 169: Charge "illegally procured" on the ground that the petition for naturalization, at the time it was presented in the state court, and at all times prior to the hearing thereon, was not supported by a certificate of the Department of Commerce and Labor, as required by the Act of 1906, as to physical examination and payment of head tax by applicant.

Held: If citizenship is granted and the judgment is not tainted with any fraud or misconduct of the party in whose favor it is entered, such judgment is final and conclusive against the attacks in other courts of co-ordinate jurisdiction. Cites *Johannessen v. U. S.*, 225 U. S. 27. See list of authorities on page 171 of the opinion.

Further decided that "Sec. 15 of Act 1906 only authorizes the annulment of judgments of naturalization when procured by fraud or other 'illegality,' as distinguished from errors of procedure, which would vitiate the judgments of all courts and for this purpose only jurisdiction is conferred upon federal courts by this section." Affirmed C. C. A., Eighth Circuit 230 Fed. 950.

20. *U. S. v. Lengyel, same v. Morris, same v. Glantz* (D. C., W. D., Penn., Feb. 10, 1915), 220 F., 720: Three cases considered together. Charge in each case "illegally procured" on the ground that the court was without power to issue a certificate of naturalization upon a petition based upon an original declaration of intention, and presented to the court more than seven years after the passage of the act, when the declaration of intention had been made prior to the Act of June, 1906. Each defendant answered admitting the averments of fact contained in the bill, but denied that such facts constituted illegal procurement. No question was raised as to the right to invoke the remedy in Section 15. It is virtually an agreed case to secure judicial construction of the seven year limit question involved. The court decided that the seven year limitation does not apply to declarations of intention made prior to the passage of the Act of June, 1906, and dismissed the bill in each case with the adjudication that there was no illegality in admitting these applicants to citizenship. If

there had been illegality in either of these cases it would have required fine distinction to fix the responsibility.

The importance of this authority lies in the rules applied in construing the provisions of the Act. We invoke them in support of our contention that the remedy provided in Section 15 was not intended to supersede the established, procedure of review of judicial error by motion for new trial, and appeal or writ of error to a higher court within time limit, where the same is adequate.

The summing up by the court on page 725 as follows: "In every aspect the Naturalization Act seems to have been intended to preserve existing conditions, except where by express words they were changed," is sufficient to show the basis for the court's ruling.

21. *U. S. v. Shanahan* (D. C., E. D., Penn, April 8, 1916). Bill to cancel certificate under Section 15 because "illegally granted." There is no suggestion of imposition upon the court, or concealment or attempt at concealment of the facts, much less of fraud, and no suggestion even that the "certificate of citizenship was illegally procured" except in the averment of error in the court in its finding of the fact of continuous residence. Petitions to cancel dismissed with this statement: "We see no justification for cancelling the certificate because of the fact (even if it were the fact) that from a view of part of the proofs which were

then before the court we differed in our judgment of the weight of the evidence."

22. *U. S. v. Mulvey* (C. C. A., Second Circuit, April 18, 1916), 232 Fed. 513. Charge certificate "illegally procured." At page 519 of the opinion "It is said that, while the certificate in this case may have been erroneously granted, it was not illegally procured, and that therefore the right to proceed by petition does not exist. We do not agree to that view of the statute." In the prevailing opinion the authority of the *Dolla* and *Neugebauer* cases is followed. Judge Hough in an able opinion dissents, and completely refutes the reasoning of these authorities. His opinion is based on the authority of *Johannessen v. United States,* 225 U. S. 227.

23. *U. S. v. Salomon* (C. C. A., Fifth Circuit, April 14, 1916). 231 Fed. 928. *Held*: That the affidavit for instituting cancellation proceedings should do more than point out errors of law in the procedure which led up to the naturalization. This is something of a departure from *Dolla* case *supra* from this circuit. This is good authority for the rule that the proceeding under Section 15 is not applicable where the illegality charged against the certificate is apparent from the record of the proceedings for naturalization. In this instance the established rule of judicial procedure is adequate.

24. *U. S. v. Leles* (D. C., N. D., Cali. 2d Div., Sept. 30, 1916), 236 Fed. 784. Charge that certificate was "illegally procured," in that the applicant was not at the time of good moral character when the state court granted the certificate and found the fact of moral character in applicant's favor. Certificate cancelled. No better illustration of the confusion that must necessarily result if the courts be authorized under this proceeding to review the decisions of the co-ordinate trials in naturalization proceedings, and to read into Section 15 what is not clearly enacted therein.

25. *U. S. v. Grinninger* (D. C., N. D., Ohio W. D., Oct. 12, 1916), 236 Fed. 285. Follows the *Cantini* case *supra,* of the same circuit.

Holds: "The requisite of five years' continuous residence is jurisdictional. If it were not proven," (does not state to the satisfaction of what court), "the certificate could not be said to have been legally procured."

CONCLUSION.

It is difficult to collate facts from the record of this case into questions which can be disposed of as abstract propositions of law.

Question One is incomplete and does not present facts from the record suffiicent for this court to declare the law applicable to the point submitted, in that it does not show public announcement by the acting trial judge, at the "open court" session of the night before, of a special session of the court, at the time and place named in the question, the next morning for hearing on the petition, and that the postponement of the hearing at the session of the court when first called was at the request of the Government because the representation from the naturalization bureau had not then arrived.

Question Two is incomplete and does not present facts from the record sufficient for this court to declare the law applicable to the point submitted, in that it does not show that the court record of the hearing and order of court admitting respondent to citizenship is complete and regular as an open court judicial determination of the case, and that the bill to cancel under Section 15 was not filed until after the trial court had adjourned for the term.

This is the first instance, as far as we can ascertain, wherein the status of a foreign missionary has been taken into consideration in determining residence as a basis for naturalization. The questions submitted do not show the conditions of his absence from the country during part of the five years probationary period, nor that his children were "at home" in this country attending public school with the benefit of free tuition as actual residents of the district during this time. The trial court had the advantage of the complete evidence as to all these facts. The acting trial judge had the applicant and his witnesses before him and beheld what manner of men they are, and thereby could decide understandingly on the question of intent which constitutes so important an element in this case. The decision of this case is momentous to respondent, and the mother of his children. On it depends whether or not their seven children, born in Brazil, shall grow up in their mother's home land as aliens, or as citizens thereof.

Respondent's absence during any part of the five years probationary period was not a return to his native country and government of his primary allegiance as in the *Aakervik, Cantini* and *Mulvey* cases, *supra.* He was in a foreign country as the agent and employee of a domestic religious corporation, with the intention to remain abroad only so long as the exigencies of his employment might require, and to return and remain at "home" as soon as possible.

As we view it, this case is *sui generis.* It ought to be decided on the full and complete consideration of all the facts of its whole record.

Hence, respondent respectfully asks this court to exercise its discretion by ordering up the whole record of the case for review and adjudication of the whole matter.

In connection with the decision of this court in *Johannessen v. United States,* 225 U. S. 227, a review and decision on the whole record of the case at bar can be made to completely cover the whole of the controverted points in the construction of the proceeding for naturalization, and the special proceeding to cancel certificates of citizenship under Section 15, of the present Naturalization Act.

Especially does respondent make the plea to this Supreme Court, that, in the decision of this case, either on the four questions certified, or on the whole record ordered up, he may not be put into the position before his millions of coreligionists in this country of having, by either actual or constructive fraud on his part, attempted to secure citizenship in the United States not being entitled to it, when he has acted from beginning to end in the utmost good faith and depended upon the officers of the court, and the decision of the court itself, to inform him whether or not he had the right of naturalized citizenship.

Respectfully submitted,

GEORGE N. ELLIOTT,
Attorney for Respondent.

CASES CITED.

Beesho vs. U. S., 178 Fed. 245, 101 C. C. A. 605 (4th Circuit) 15
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2 *Corpus Juris* 1124 8
2 *Corpus Juris* 1126, Sec. 157 15
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U. S. v. Rockteshell, 208 Fed. 530 29
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U. S. v. Staller, 180 Fed. 910 29

In the Supreme Court of the United States

OCTOBER TERM, 1916.

THE UNITED STATES OF AMERICA
vs.
SOLOMON LOUIS GINSBERG. } No. 401.

BRIEF SUPPORTING DEFENDANT'S POSITION UNDER THE "FOURTH" QUESTION CERTIFIED FOR DETERMINATION OF THIS COURT.

STATEMENT OF THE CASE.

The case comes up here upon a certificate by the Circuit Court of Appeals upon certain questions of law arising from the record, the decision of which is indispensable to a determination of the case.

The suit was brought against Ginsberg by the United States under the provisions of Section 15 of the Act of June 29, 1906 (34 St. L. 596), to set aside and cancel the certificate of citizenship issued to Ginsberg by the United States District Court for the Western District of Missouri, December 18, 1912, on the ground that such certificate of citizenship was illegally procured.

One of the grounds for cancellation relied on by the government was, that at the final hearing for naturalization, the undisputed facts disclosed that Ginsberg was not qualified by residence for citizenship, but that the court or judge who heard the petition found him so qualified, but misapplied the law and the facts, and ordered the issuance of the certificate. No claim was or is made by the government of any fraudulent practice or wilful misconduct on the part of Ginsberg, or any one acting for him, it being conceded that at the time of said hearing Ginsberg concealed nothing from the court, and made a full disclosure of all the facts required by law touching his residence, etc. No claim is made that Ginsberg was guilty of any bad faith, and it is admitted that his petition for naturalization was in due form; that due notice thereof was given by the clerk of court, and that the final hearing was in all respects regular, except as the last statement may be affected by the facts certified in the First question (with which this brief is not concerned).

Upon the facts disclosed by the record the Circuit Court of Appeals certified certain questions, four in number, the last of which, and the only one in this brief discussed, is as follows:

> 4.—"May a certificate of citizenship be set aside and canceled in an independent suit brought under Section Fifteen of the Act of

June 29, 1906, on the ground that it was illegally procured, if the uncontradicted evidence at the hearing of the petition showed indisputably that the petitioner was not qualified by residence for citizenship, and that the court or judge who heard the petition and ordered the certificate misapplied the law and the facts?''

Through the courteous assent of counsel and by the indulgence of this court, the writer, representing the appellee in the case of U. S. vs. Mueller, now pending and undecided in the same Circuit Court of Appeals which certified the foregoing question, has been permitted to file this brief as *amicus curiae.* The said court of appeals has postponed the Mueller case until the determination by this court of the certified questions in this case, and inasmuch as the determination of the ''Fourth'' certified question may directly affect the right of appellee in the case referred to, the writer begs to submit this brief, in order that the determination of the important questions presented by the ''Fourth'' certified question may be made with knowledge of some of the conditions to which it will be applicable.

To state more particularly: In the Mueller case, as well as in many other cases still pending and undetermined in the lower Federal courts, the Government is seeking to set aside certificates of citizenship,

upon various grounds of mere irregularities of procedure, not involving fraud, bad faith or total lack of jurisdiction, basing its right so to do upon Section Fifteen; it being the Government's contention, in all such cases, that notwithstanding the fact that a certificate of citizenship had been duly issued by a court after a final hearing on the petition, upon due notice to the government, and at which the government was represented and litigated the same objections which are made the basis of the suit under Section Fifteen, yet such certificates may nevertheless be attacked, and reviewed both as to law and the facts, in a suit under Section Fifteen, upon the ground that they were "illegally" procured. In other words, the contention of the Government in the Mueller case and other cases pending below is, broadly, that *any* order or judgment of a court of competent jurisdiction admitting an alien to citizenship can be reviewed in an action under Section Fifteen, both as to facts and the law, and upon the same grounds of objection which were distinctly presented and adversely determed upon the final hearing in the proceedings for naturalization.

It is further to be observed, that the Fourth certified question as framed by the Court of Appeals, is intended to relate to that class of cases only, where the court of naturalization had acquired undoubted

jurisdiction to hear and determine the petition for naturalization, but had misapplied the law and the facts. Hence in discussing the question so certified, it may for convenience be thus re-stated:

> "Is a certificate of naturalization, issued by a court of competent jurisdiction in the good faith exercise of the jurisdiction conferred by the Act of Congress, to be deemed 'illegally procured' within the meaning of Section Fifteen, because the certificate was the result of a decision based upon wholly erroneous findings of fact, and upon an erroneous theory of the law?"

An affirmative answer to the "Fourth" certified question, as thus re-stated, involves the assumption, as the court will see, that by Section Fifteen of the Act it was intended that all questions of fact and law involved in the issuance of a certificate of citizenship rendered by a court of naturalization in the exercise of jurisdiction to hear and determine the same, may be reviewed in an action, under Section Fifteen, and certificates cancelled as being "illegally procured."

In other words, an affirmative answer amounts to a contention that a decree of naturalization, untainted by fraud or bad faith, rendered in a proceeding for naturalization by a court of competent jurisdiction and upon due notice to the government and in which the government had appeared and litigated

the matter, is not (because of the provisions of Section Fifteen) entitled to the same or like effect, or to be given the same or like dignity, as any other judgment of a court of competent jurisdiction.

The accuracy of this contention must of course depend upon whether, by the provisions of Section Fifteen, it was intended by Congress to divest the judgments of naturalization of all the attributes of conclusiveness, and thus relegate them to a species of evidence of an inferior character.

The apology we offer for the somewhat involved re-statement of the fourth certified question is:

(a) That a clear understanding of its import pertinently requires a consideration of the applicability of certain phases of the doctrine of *res adjudicata,* and

(b) That in many of the lower Federal cases, as attested by many conflicting decisions, as well as in the brief of counsel for the government in this case, this consideration is either overlooked, or not given the weight it deserves.

Having in mind then, in so far as this brief is concerned, that the fourth certified question related to that class of cases only, where the court of naturalization, in rendering judgment of naturalization, had acquired jurisdiction to hear and determine the petition for naturalization, but had misapplied the law

or the facts, we beg to submit the following considerations in support of a negative answer to the fourth question.

ARGUMENT.

The argument in support of the position may be considered under the following subdivisions:

1. That a judgment or decree of a court of competent jurisdiction admitting an alien to citizenship in a proceeding in which the government appeared and participated, is of the same dignity as any other judgment of a court having jurisdiction.

2. That an order admitting to citizenship, having the force and effect of a judgment, is conclusive as to all matters necessarily before the court, and which were distinctly presented, put in issue and determined by a court of competent jurisdiction.

3. That in view of the well-settled principle respecting the conclusiveness of judgments in general, and the character of the proceeding for admission to citizenship under the Act of 1906, the words "illegally procured," as they are used in Section Fifteen of the Act in question, must be construed to mean a certificate which is false or spurious, or which was procured by wilful misconduct on the part of the applicant or those acting for him, and that the section in ques-

tion was not intended to cover a certificate issued as the result of a judicial hearing in a good faith attempt to exercise the jurisdiction conferred by the Act of Congress.

1 & 2.

Prior to the passage of the Act of June 26, 1906, the courts, both Federal and State, uniformly held that an order admitting to citizenship had the force and effect of a judgment and was conclusive as to all matters necessarily involved and decided by the court. A full collection of the authorities upon the proposition will be found in *Volume* 2, *Corpus Juris,* on page 1124.

It should be noted that the earlier acts of Congress were radically different from the Act of 1906, in this, that in the matter of proceedings for naturalization no provision was made for notice of the application, nor was there any provision granting the right to the government to appear and oppose the granting of naturalization.

Prior to the act of 1906 an alien was permitted to obtain his certificate of citizenship by merely appearing before one of the courts designated by law for that purpose, and submitting his application on *ex parte* proofs, without notice to the government and without opportunity to appear. The proceeding was conducted and controlled by the interested in-

dividual alone. Yet notwithstanding the purely *ex parte* character of the proceeding, all such judgments were uniformly treated as to conclusiveness and effect, on a par with any other judgments. By the Act of June, 1906, radical changes were made in the law. The proceedings for admission to citizenship have taken on all the characteristics of a real civil case, in the nature of an adversary proceeding. Thus, upon the filing of a petition for naturalization the clerk of court is required immediately to give notice thereof and of the date of final hearing thereon and the names of witnesses for the applicant (See provisions of Section 5 of the Act of 1906). By Section Six the petition is required to be docketed, but the hearing cannot be had until at least ninety days have elapsed after the filing and posting of notice of such petition, thus giving the government plenty of time in which to appear and prepare the case. By Section Nine every final hearing is required to be had in open court before a judge thereof, and upon such hearing the applicant and witnesses must be examined under oath before the court and in the presence of the court.

By Section Ten provision is made for taking depositions of witnesses, but only upon notice to the United States Attorney and Bureau of Naturalization. By Section Eleven the government is given the right

to appear before the court for the purpose of cross-examining the petitioner and the witnesses concerning any matter touching or affecting his right to admission, and *"shall have the right to call witnesses, produce evidence, and be heard in opposition to any petition in naturalization proceedings."*

By Section Twenty-eight the Secretary of Labor is given power to make such rules and regulations as may be necessary for properly carrying into execution the various provisions of this act. One of the regulations prescribed by the Secretary of Labor (who by law is charged with the administration of the naturalization laws) requires the clerk of every court to inform the Bureau of Naturalization, on certain prescribed forms, of every petition for final hearing in detail, and the day of final hearing, etc. (Regulation No. 15 of Naturalization Regulations.)

These and other related provisions contained in this Act all indicate conclusively that a proceeding for naturalization is not intended to be an informal hearing, *ex parte* in its nature, but a very formal judicial proceeding, like any other judicial proceeding, having all the characteristics of a civil suit.

In view of these considerations, indicating as they do that under the Act of 1906 the intent of Congress was in every way to discourage admission to citizenship by an *ex parte* proceeding, and provid-

ing for ample opportunity for the government to appear and oppose the application for admission, we submit that a judgment of admission must be accorded the force of the familiar principle of *res adjudicata* in the language of Mr. Justice Harlan in *Southern Pacific R. R. Co. vs. U. S.* 168 *U. S.* 1 *p.* 48, (quoted approvingly in the case of Johannessen vs. U. S. 225 U. S. 227):

> "That a right, question or fact distinctly put in issue and directly determined by a court of competent jusisdiction, cannot be disputed in a subsequent suit between the same parties or their privies."

3

The foregoing considerations were deemed material as shedding light upon the proper construction of Section Fifteen of the Act of 1906, for which counsel for the government makes too broad a claim. To construe the section as permitting a cancellation on the grounds of mere errors of law or fact, is not, in view of what has been said, justified by its language nor supported by reason or authority. The section authorizes an action

> *"for the purpose of setting aside a certificate of citizenship on the ground of fraud or on the ground that such certificate was illegally procured."*

Insofar as the section authorizes an action on the grounds of fraud we are not here concerned with its construction; hence the only question is what was meant by certificate "illegally procured."

Bearing in mind that the naturalization proceedings under the Act of 1906 have all the elements of a civil case and terminate in a judgment, whose character and effect is that of any other judgment—a circumstance the knowledge of which by Congress cannot well be denied, is it not a bold assertion to say that by the words "illegally procured" Congress meant to authorize a cancellation for mere errors of law or fact, which in effect is but a re-trial of the same issues that were already determined? Had Congress intended such extraordinary result, is it not more in consonance with reason to suppose that it would have said so in express words?

The whole Act of 1906 bears upon its face indubitable evidence of intent to raise the proceedings for naturalization to the dignity of a formal judicial proceeding, free from the vices of an *ex parte* character, as theretofore prevailing, and in the absence of express language to that effect, the provisions of Section Fifteen, could not be meant to wholly neutralize and practically destroy the effect and results of a judgment of naturalization, which the Act itself makes so difficult of attainment.

If mere errors of law or of fact were still open for further litigation, in an action under said section, then it must be upon the theory that the proceedings instituted by petition for citizenship, ninety days' notice to the government, examination and cross-examination of witnesses in final hearing in open court before a judge thereof, with full opportunity to the government to appear in opposition, are all a mere idle ceremony, not binding upon the government, and really serve no other purpose than to deceive and lull the unoffending applicant into the belief that his certificate of citizenship, obtained after all the red tape judicial proceedings, grants him the sovereign right of American citizenship, whereas in fact it is a mere "scrap of paper," which can be cancelled at any time, at the caprice of the government officials, whenever they may find a judge whose opinion may differ from that of the naturalization court.

We are unable to perceive any sense or reason for surrounding the naturalization proceedings with all the safeguards characteristic of a civil case, as the Act of June, 1906, does, if after all that is required to be done to obtain a certificate, the resulting judgment is not to be attended by the same incidents which always have been held to appertain to like judicial proceedings. If Congress had intended to

annul the well-settled principles of the doctrine of *res adjudicata,* and all the other principles applicable to judgments and decrees, as they existed at the time of the enactment of Section Fifteen, it would have used a somewhat different phrase than "illegally procured;" that it did not so intend seems to our mind foreclosed by the radical changes it made in the procedure for naturalization; surrounding it, as already noticed, with all the safe-guards of an adversary civil suit, intended to do away with all the evils attending an *ex parte* proceeding for naturalization.

The claim of the government in the last analysis is, that where a judgment of citizenship is granted by a court, the government is entitled to a *new trial* of law and facts, either in the court that rendered the judgment, or in another court of co-ordinate jurisdiction, by bringing an action under Section Fifteen. A construction so far-reaching can be justified only by language more unequivocal than that of Section Fifteen. In support of the government's contention, it is said that inasmuch as no appeal or writ of error is given by the Act of 1906, it therefore must have been the intention of the Act that the proceedings for citizenship should be reviewed or reconsidered, not by appeal, but by an action authorized in this section, citing *U. S. vs. Dolla,* 177 *Fed.* 101, and *U. S. vs. Neugebauer,* 221 *F.* 938.

But because the Act of 1906 makes no special provision for appeal or writ of error, it does not follow that errors of law or of fact, committed by the court in naturalization proceedings, cannot be reviewed the same as in other civil cases, by appeal or writ of error. Such method of review has been recognized and repeatedly permitted by the Circuit Court of Appeals of most of the circuits.

U. S. vs. Balsara, 180 *Fed.* 694, 103 *C. C. A.* 660 (*2d Circuit*);

Beesho vs. U. S. 178 *Fed.* 245, 101 *C. C. A.* 605 (*4th Circuit*);

U. S. vs. Posluny, 179 *Fed* 836, 103 *C. C. A.* 324 (*2d Circuit*);

U. S. vs. Martocana, 171 *Fed.* 397, 96 *C. C. A.* 353 (*3d Circuit*);

U. S. vs. Doyle, 179 *Fed.* 687, 103 *C. C. A.* 233 (*7th Circuit*);

U. S. vs. Ojala, 182 *Fed.* 51, 104 *C. C. A.* 491 (*8th Circuit*); *and also by State courts;*

See collection of cases in 2 *Corpus Juris,* 1126, *Sec.* 157.

But were it conceded that a judgment of a court of naturalization cannot be reviewed by writ of error or appeal, it does not follow that therefore Section Fifteen was intended as a substitute for a writ of error or appeal. The circumstance that no writ of error or appeal will lie to review a decree of naturalization, is not material, and certainly not controlling as an aid in ascertaining the intent of Congress as to what was meant by "illegally procured."

But as to *U. S. vs. Dolla,* to the contrary, no more need be said than to quote a part of the opinion of the court in *U. S. vs. Lenore,* 207 *Fed.* 867, where in referring to the Dolla case, the court said:

> "In U. S. vs. Dolla, 177 Fed. 101, 100 C. C. A. 521, 21 Ann. Cas. 665, it was held by the Circuit Court of Appeals of the Fifth Circuit that a proceeding for the naturalization of an alien did not constitute 'a case' so as to permit a review by appeal or writ of error in the Circuit Court of Appeals. This decision has never been cited and seems to be out of accord with the practice in other circuits. In my judgment it proceeds out of an erroneous interpretation of the statute. The hearing in court by which aliens are naturalized must be an exercise of judicial power. Otherwise Congress could not confer that authority upon federal courts. Muskrat vs. United States, 219 U. S. 346, 31 Sup. Ct. 250, 55 L. Ed. 246. Again, it has been uniformly held that judicial power can be exercised in the federal courts only when the proceeding takes the form of 'a case' or 'controversy' within the meaning of those terms as used within the judicial article of the Constitution. Of these terms the word 'case' is more comprehensive. The language of Mr. Justice Field in the case *In re Pacific Railway Commission* (C. C.) 32 Fed. 241, 255, has been frequently quoted and approved by the Supreme Court, and seems the most accurate statement which has yet been made on the subject:

'The judicial article of the Constitution mentions cases and controversies. The term "controversies" if distinguishable at all from "cases," is so in that it is less comprehensive than the latter, and includes only suits of a civil nature. *Chisholm v. Georgia,* 2 Dall. 431, 432. (1 L. Ed. 440); 1 Tuck, Bl. Comm. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication.'

The decision in the Fifth Circuit seems to me to be in conflict with the established doctrine of the Supreme Court. In *Fong Yue Ting vs. United States,* 149 U. S. 698, 728, 13 Sup. Ct. 1016, 1028, (37 L. Ed. 905), the question involved was the deportation of a Chinaman from the United States under the law of 1892; the case having many of the administrative features which in some countries attach to the naturalization of aliens. Under the statute, after a Chinaman had been arrested, it was made the duty of the officer to bring him

before a United States court, where the question of his right to be in the country was to be summarily heard without pleadings. Of such a proceeding the court says:

" 'When, in the form prescribed by law, the executive officer, acting in behalf of the United States, brings the Chinese laborer before the judge, in order that he may be heard, and the facts upon which depends his right to remain in the country be decided, a case is duly submitted to the judicial power; for here are all the elements of a civil case—a complainant, a defendant and a judge—actor, *reus et judex.*' "

Speaking of the extent of the judicial power confered by the Constitution, Chief Justice Marshall said, in *Osborn v. United States Bank,* 9 Wheat, 738-819 (6 L. Ed. 204):

" 'This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws and treaties of the United States, when any question respecting them *shall assume such a form that the judicial power is capable of acting on it.* That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States.' "

In *Smith v. Adams,* 130 U. S. 167, 173, 9 Sup. Ct. 566, 568, (32 L. Ed. 895), Mr. Justice

Field, speaking for the court, used the following accurate language:

> " 'Whenever the claim or contention of a party takes such a form that the judicial power is capable of acting upon it, then it has become a case or controversy.' "

within the meaning of those terms as used in the federal Constitution. See also, *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 475, 155 U. S. 3, 14 Sup. Ct. 1125, 15 Sup. Ct. 19, 38 L. Ed. 1047, 39 L. Ed. 49, et seq., where the cases are fully reviewed.

> The term 'case,' in the Court of Appeals Act, clearly has the same significance as in the federal Constitution. Under the statute of 1906 the naturalization of an alien has all the qualities of a case. It proceeds upon petition and notice. The government is entitled to be present, by its counsel, and examine the petitioner and his witnesses, and to produce other witnesses. The Supreme Court in the case of *Johanessen v. United States*, 225 U. S. 227, 237, 32 Sup. Ct. 613, 56 L. Ed. 1066, clearly indicates that the proceeding under this statute has the qualities of a case."

That by the enactment of Section Fifteen of the Act it was not the intention of Congress to do away with the usual incidents of conclusiveness as to matters litigated, is also apparent from the opinion of this Court in *Johanessen vs. United States*, 225 U. S. 227.

In the Johanessen case, the action was brought by the government against Johanessen under Section Fifteen of the Act of 1906, to set aside the certificate issued to him by a state court long prior to the act referred to, on the ground that it was procured by fraud. The fraud consisted in procuring by Johanessen, perjured testimony by two witnesses to the effect that Johanessen had resided in the United States for five years, when in fact he had not been a resident for the prescribed time. The case was heard upon a demurrer to the bill of complaint. The contention of the appellant Johanessen in the Supreme Court, among others, was that the decree of naturalization is a judgment subject to all the rules of law applicable to judgments as such, and that a court of equity could not, prior to the Act of 1906, cancel such judgment for fraud intrinsic the record, that is, founded upon perjured testimony, or any other matter which was actually presnted and considered by the court. In considering the case, the court took pains to set forth the provisions of the earlier Act of Congress relating to citizenship and to point out that the procedings for naturalization under the earlier acts were wholly *ex parte,* without notice to the government and without opportunity to appear and oppose the application. The certificate there sought to be set aside was procured in the year 1892, and long prior to the passage of the Act of 1906. In referring, however, to the Act

of June, 1906, the court makes this significant statement:

> "The Act of June 29, 1906, in Sec. 11 (34 Stat. 599), declares that the United States shall have the right to appear in naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of his petition, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of naturalization. No such provision was contained in the act as it formerly stood. * * * * * *What may be the effect of a judgment allowing naturalization in a case where the Government has appeared and litigated the matter does not now concern us. (See 2 Black, Judgts., Sec. 534, a.) What we have to say relates to such a case as is presented by the present record, which is the ordinary case of an alien appearing before one of the courts designated by law for the purpose, and, without notice to the Government and without opportunity, to say nothing of duty, on the part of the Government to appear, submitting his application for naturalization with *ex parte* proofs in support thereof, and thus procuring a certificate of citizenship."

And in refusing to accord to the certificate there involved the conclusive effect claimed for it, the court did so solely upon the ground of the *ex parte* character of the proceeding on which the same was based.

Reserving for the future the question of the effect of a judgment of naturalization in a case where the government has appeared and litigated the matter, the court cited 2 Black on Judgments, Sec. 534-a, where it is laid down as a universal rule, that where the United States voluntarily appears in court as a litigant of any question of law or fact, it is subject, like any other suitor, to the principle of *res adjudicata*.

As already noticed, the proceeding for citizenship in the case at bar was had under the Act of June, 1906, and as shown by the bill of complaint, was essentially the kind of contested judicial proceeding which, under the reasoning of the Johanessen case, is entitled to the full benefit of the conclusive effect of a judgment. Bearing in mind that in the Johanessen case the ground for cancellation was actual fraud in procuring of perjured testimony, the intimation of the court as to conclusiveness of judgment under the Act of 1906, even in cases of fraud, completely undermines the foundation of the government's argument here, that the intent of Section Fifteen was to authorize a wholesale review of law and fact in cases of naturalization certificates.

Since the government's contention is based upon the two propositions, that no appeal is provided by the Act of 1906, and that the proceedings for naturalization are *ex parte*, neither of which, as above shown, is well taken, we submit that as applied to the facts

of the case at bar embraced in the "Fourth" question, the argument of counsel to support the construction contended for, is wholly unsound. We also claim that the undoubted weight of authority as to the construction of the words "illegally procured" is in favor of our contention. Section Fifteen has been under consideration before the federal courts in a number of cases, but since the rendition of the decision in the Johanessen case by the Supreme Court the cases cited by counsel for the government have ceased to have weight as authority.

The rule, as now followed by the federal courts, is thus laid down in Volume 2 Corpus Juris on page 1126:

> " 'ILLEGALLY PROCURED' While there is some difference of opinion as to the meaning of the term 'illegally procured,' the better rule seems to be that it imports a certificate issued without authority of law, and, in effect, false and spurious; not an error of law, but subordination or some other illegal means to impose on the court. When a certificate is issued as the result of a judicial hearing in a good faith attempt to exercise the jurisdiction conferred by the act of congress, it is not open to attack in another court of co-ordinate jurisdiction simply by reason of alleged errors which may have occurred in the court pursuant to whose judgment the certificate was issued. Errors of that kind can properly be reached only by appeal or writ of error."

In the well-considered case of *United States vs. Lenore,* 207 Fed. 865, the certificate was sought to be cancelled under Section Fifteen as "illegally procured" because the petition for naturalization was not signed by the petitioner in "her own handwriting," as required by the Act of 1906, but only by her mark. It appearing in the bill there involved that the objection urged for cancellation was presented and decided adversely to the government in the naturalization proceeding, the court held judgment of naturalization conclusive and dismissed the bill. In refusing to accord to the words "illegally procured" the broad construction as claimed by the government in the case at bar, the learned judge took occasion to review the history of the causes which led to the enactment of the Act of 1906, as follows:

> "A brief history of the causes which led to the passage of the act of 1906 will, in my judgment, show that Congress never intended to confer the jurisdiction which is here invoked.
>
> "In 1902 fraudulent and illegal practices in the naturalization of aliens were discovered in the city of St. Louis, Mo. Some of these misdoings are recounted in the opinion in *Dolan vs. United States,* 133 Fed. 440, 69 C. C. A. 274. The prosecutions which resulted in the Eastern district of Missouri led to investigations in other cities, and the discovery of many fraudulent and illegal practices in the issuance

of certificates of naturalization. In some cases perjury and subornation of perjury were resorted to for the purpose of deceiving the court and obtaining certificates for aliens who had not resided in the country for the requisite time. In other cases foreigners were marched into the court in large companies, and the oath of allegiance administered to the whole company, although many of them were unable either to speak or understand the language that was used. Two persons made the ordinary witness' oath for the whole company. Upon this sham and spurious proceeding certificates were issued. In other cases clerks of court issued such certificates without any proceeding in court whatever, and fabricated a judicial record to support the certifcates. It was even discovered that some clerks were engaged in a regular brokerage business in certificates of naturalization. This practice went so far that some of these certificates were sold to aliens residing abroad, who had never been in the United States, in order that they might be used for fraudulent purposes, both with respect to foreign countries and this country. The result of these investigations was gathered together in an elaborate report, which was presented to Congress and resulted in the passage of the act of 1906. Congressional Record, Vol. 40, part of page 7036; House Documents, Vol. 44 (Miscellaneous) 59th Congress, last Session. It will be seen that the mischievous practices which the statute was intended to correct fell into two

general classes: First, the obtaining of certificates of naturalization through the deception of the court by means of perjury and subornation of perjury. Such practices were fraudulent, and certificates obtained thereby are accurately described as having been 'obtained by fraud.' This had been familiar law, not only in the case of naturalization certificates, but of patents for public land. Second, false and spurious certificates were obtained without any judicial proceeding whatever, or by a proceeding in court which was itself sham and spurious. Certificates thus obtained are accurately described as having been "illegally procured." Neither the debates in Congress nor the report of the investigation which was laid before Congress contained any suggestion that any other evils were intended to be dealt with, or that the phrase 'illegally procured' was intended to set one court to annulling the judgments of another court of co-ordinate jurisdiction because of a difference of opinion in regard to a matter of law. To say that a certificate which is issued pursuant to a full hearing in court is 'illegally procured,' if any error occurs in the proceeding, would be a wide departure from the language which courts have been accustomed to use in referring to judicial error. 'Illegally procured' imports, not an error of court, but willful misconduct on the part of the holder of the certificate or those who have acted in his behalf. The history of the statute shows that its language can be given full effect according to the mischief that

was present to the thought of Congress, without upsetting the whole judicial system that has hitherto obtained among courts of coordinate jurisdiction. I am, therefore, unable to follow the decisions in *United States v. Meyer* (D. C.), 170 Fed. 983; *United States v. Plaistow* (D. C.), 189 Fed. 1007, and *United States v. Schnurr* (D. C.), 163 Fed. 648. I concur in the view expressed in *United States v. Luria* (D. C.), 184 Fed. 643, 646, that 'illegally procured' does not mean that the certificate was issued through error of law. Errors of court, committed in the honest exercise of their jurisdiction under the naturalization laws, must be corrected the same as in other cases by appeal or writ of error. Such a method of review has been recognized in the Circuit Courts of Appeal of most of the circuits." * * * * * * The act of 1906 vests jurisdiction to naturalize aliens in the highest courts of the state and nation exercising original jurisdiction. This authority ought not to be construed as so special and restricted as to deprive those courts of all discretion as to matters of procedure. The statute clearly defines the qualifications which aliens must possess in order to entitle them to citizenship. There are also numerous provisions defining in detail the procedure and pleadings which shall be adopted. The latter parts of the act are simply intended to prevent the admission to citizenship of those who do not possess the qualifications stated in the act. They are matters of procedure, and ought to be treated as

other matters of procedure are in these courts. This is especially true where a court of co-ordinate jurisdiction is asked to set aside a decree. If the court entering the decree has jurisdiction its certificate certainly ought not to be canceled for failure to follow strictly all the details of the statute relating to procedure. The case of *United States v. Stoller* (D. C.), 180 Fed. 910, seems to me sound and to contain many sensible observations on this subject.

"When a certificate of naturalization is obtained by fraud, or is illegally procured in the sense that it has been issued without authority of law, and is in effect false and spurious, a suit in equity may be maintained for its cancellation. This has been fully established in the federal courts in the case of patents for land obtained under similar circumstances. Such a suit is not intended to correct an error of the court, but to defeat the fraud of the litigant. But when a certificate is issued as the result of a judicial hearing in a good-faith attempt to exercise the jurisdiction conferred by the act of Congress, it is not open to attack in another court of co-ordinate jurisdiction simply by reason of alleged errors which may have occurred in the court pursuant to whose judgment the certificate was issued. Errors of that kind can properly be reached only by appeal or writ of error.

"The statute authorizes a suit to cancel a certificate only 'on the ground of fraud' or

'on the ground that such a certificate was illegally procured.' In my judgment the certificate here involved falls under neither of these classes. The bill must, therefore, be dismissed, and it is so ordered."

To the same effect are the following cases:

U. S. vs. Hartman, 232 *Fed.* 797.
U. S. vs. Ness, 230 *Fed.* 950.
U. S. vs. Luria, 184 *Fed.* 643-646.
U. S. vs. Staller, 180 *Fed.* 910-913.
U. S. vs. Niehmann, 183 *Fed.* 788.
U. S. vs. Anderson, 169 *Fed* 201.
U. S. vs. Albertini, 206 *Fed.* 134.
U. S. vs. Rockteshell, 208 *Fed.* 530.
U. S. vs. Ness, 217 *Fed.* 169.
U. S. vs. Rose, 166 *Fed.* 999.

We respectfully submit that the Fourth question certified by the Circuit Court of Appeals should be answered in the negative.

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